REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

Lord Chancellor Eldon;

FROM THE

COMMENCEMENT OF THE SITTINGS BEFORE HILARY TERM, 1818,

TO THE

END OF THE SITTINGS AFTER MICHAELMAS TERM, 1819.

By CLEMENT TUDWAY SWANSTON, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

1818, 1819, 58, 59 GEO. III.

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1822.

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Lord Eldon, *Lord High Chancellor.*
Sir Thomas Plumer, *Master of the Rolls.*
Sir John Leach, *Vice-Chancellor.*
Sir Samuel Shepherd, *Attorney-General.*
Sir Robert Gifford, *Solicitor-General.*

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OF

CASES REPORTED

IN THIS VOLUME.

ERRATA.

Page 43. line 15, the sentence should be *read* thus; a distinction which has introduced the custom of the King receiving addresses from the Lord Mayor and Common Council on the throne, not addresses from the Common Hall; the House of Lords also receiving a petition from the latter body only as the petition of the individuals who signed it.

Page 157. line 19. *after* on, *insert*, some of.
—— 167. — 20. *for* entitled, *read* interested.
—— 322. — 9. The sentence, (of which two lines were transposed at the press,) should be *read* thus: It now appears that the suit in *Scotland* is *bonâ fide*, and the injunction is sought, not against the persons in whose name this bank stock stands, but against the Court of Session, which never can be made effectual. If you think proper, and you are entitled to ask for an injunction against individuals, that suit never can do you harm.



REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

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July, 10.
13—18.
20, 21.

CROWLEY'S Case. (*a*)

The Lord *Chancellor* can issue the writ of *habeas corpus* at common law in vacation.

Whether, for the purpose of determining that the answers of a bankrupt on his examination are unsatisfactory, the commissioners can resort to the evidence of third persons, *quære*.

Commissioners having, on the evidence of third persons, committed the bankrupt for not answering satisfactorily, must state that evidence *in hæc verba* on the warrant of commitment; and a warrant stating only the effect of the evidence, is defective in substance.

A bankrupt answering a question embodying a statement relative to the acts of a third person, without denying or qualifying that statement, is not understood as admitting it.

A COMMISSION of bankruptcy, dated the 7th of *March*, 1815, having been issued against *John Crowley*, he was, on the 18th of *June*, 1816, committed to prison by the commissioners. The warrant of commitment was in the following words: — "At *Guildhall*, *London*, 18th day of *June*, 1816. Whereas his Majesty's commission, under the great seal of *Great Britain*,

(*a*) S. C. 1 *Buck*. 264.

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tain, grounded upon the several statutes made and now in force concerning bankrupts, or some or one of them, bearing date at *Westminster*, the seventh day of *March*, 1815, in the fifty-fifth year of his present Majesty's reign, hath been awarded and issued against *John Crowley*, late of *Saint James Street*, in the parish of *Saint James, Westminster*, in the county of *Middlesex*, tavern-keeper, wine merchant, dealer and chapman, directed unto *G. W.*, *A. E. J.*, *M. F. A.*, *W. K. S.*, and *R. G.*, Esquires, any four or three of them: And whereas the said commissioners, in the said commission named, or the major part of them, having first respectively taken the oath appointed by an act of parliament passed in the fifth year of the reign of his late Majesty King *George* the Second, intituled, "An act to prevent the committing of frauds by bankrupts,' for commissioners of bankrupts to take before they act as commissioners in the execution of the powers or authorities given and granted by the said act or acts of parliament now in force concerning bankrupts, and having begun to put the said commission into execution, upon due examination of witnesses, and other good proofs before them had and taken, did find that the said *John Crowley*, before the date and issuing forth of the said commission, did become bankrupt, within the true intent and meaning of some or one of the statutes made and now in force concerning bankrupts, and did adjudge and declare the said *John Crowley* bankrupt accordingly: And whereas the major part of the said commissioners did cause notice to be given in the *London Gazette*, that the said *John Crowley* was thereby required to surrender himself to the said commissioners in the said commission named, or the major part of them, on the 15th day of *April*, 1815, on the 22d day of *April*, 1815, on the 20th day of *May*, 1815, at one of the clock in the afternoon on each of the said days, on the 8th day of *July*, 1815, at ten o'clock in the forenoon on that day, on the 26th day of

August,

August, 1815, at ten o'clock in the forenoon on that day, on the 2d day of *December*, 1815, at one o'clock in the afternoon on that day, on the 24th day of *February*, 1816, at one o'clock in the afternoon on that day, on the 4th day of *June*, instant, at ten o'clock in the forenoon on that day, on the 18th day of *June*, instant, at twelve o'clock, at *Guildhall*, *London*, in order to finish his examination, and to make a full disclosure and discovery of his estate and effects; and being then and there duly sworn and required by us to make such disclosure and discovery, we, being the major part of the commissioners in the said commission named, whose hands and seals are hereunto subscribed and set, having first respectively taken the oath above mentioned, appointed to be taken by commissioners of bankrupts, did cause the following questions to be propounded to him the said *John Crowley*, that is to say; On the 4th day of *June* last, when you appeared before the commissioners at *Guildhall* to pass your last examination, you had no accounts ready to present to them; you then requested the commissioners to adjourn your last examination, undertaking to produce your accounts to your assignees on *Thursday* then next ensuing; on the 14th of *June* you were brought up to be examined before the commissioners, and upon being asked whether you had produced your accounts to your assignees, you stated that you had not and could not, because your books and papers were in the possession of a friend of yours, a Mr. *Hamilton*, at No. 122, in the *London Road*, to whom you had delivered them since your bankruptcy, who refused to redeliver them to you; the commissioners have since that time issued their summons to bring *Hamilton* before them, but it appears, from the deposition of the messenger, that although he waited on *Saturday* night till between twelve and one o'clock for the return of *Hamilton* to his lodging, and went again to his

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lodging at eight o'clock on *Monday* morning, that he was not able personally to serve *Hamilton*, who had returned home after the time above stated on *Saturday* night, and had gone out again before the messenger arrived again on the *Monday* morning; it likewise appears to the commissioners, from the deposition of their messenger, that a womán in the house had informed Mr. *Hamilton*, that the messenger had been there, who replied he knew what he wanted, but that all the proceedings were illegal, and there was an end of it: Have you any accounts now to produce to the commissioners, or any further reason to give why you do not produce them? Answer. I have no accounts to produce, and I have no further reason to give why I do not produce them, except that I have two petitions before the Chancellor to supersede this commission; the first, upon the grounds of a commission being now in force against me, bearing date in 1808; and the second, of no act of bankruptcy to this commission; but still am ready to render every account possibly in my power to the commissioners: which answer of the said *John Crowley* not being satisfactory to us the said commissioners, these are therefore to will and require and authorise you, immediately upon receipt hereof, to take unto your custody the body of the said *John Crowley*, and him safely convey to his Majesty's prison of the *King's Bench*, and him there to deliver to the marshal, keeper, or warden of the said prison, who is hereby required and authorised, by virtue of the commission and statute aforesaid, to receive the said *John Crowley* into his custody, and him safely keep and detain, without bail or mainprize, until such time as he shall submit himself to us the said commissioners, or the major part of the commissioners by the said commission named and authorised, and full answer make to our or their satisfaction, to the question so put to him as aforesaid; and for your so doing this shall be your sufficient warrant. To *I. W.* our messenger,

senger, or *W. B.* his assistant, and to the marshal, keeper, or warden of his Majesty's prison of the *King's Bench* or to his deputy there." 1818. CROWLEY' Case.

The bankrupt at his own instance being brought up by writ of *habeas corpus*, Mr. *Rose*, for the assignees, objected that the writ had issued improvidently. In *Jenkes's* case, (*a*) Lord *Nottingham*, after great research, decided that the Lord Chancellor cannot issue a writ of *habeas corpus* at common law in vacation. The bankrupt having remained in prison since *June*, 1816, without any previous application for his liberation, is not entitled to a writ under the *habeas corpus* act (*b*), the fourth section of which provides, that any person wilfully neglecting, by the space of two whole terms after his imprisonment, to pray a *habeas corpus* for his enlargement, shall not have any *habeas corpus* to be granted in vacation time in pursuance of that act. The bankrupt therefore is not entitled to the writ either at common law, or under the statute. Serjeant *Onslow's* act (*c*) leaves the law unchanged in this respect. *July* 10.

On this day Sir *Samuel Romilly* and Mr. *Cullen* were heard in support of the writ.— *July* 13.

The objection that this court cannot issue a writ of *habeas corpus* at the common law in vacation, rests on a passage in *Blackstone's* Commentaries (*d*), who states that in *Jenkes's* case, Lord *Nottingham* refused the writ,

(*a*) *July*, 1676. Cited 3 *Bl. Com.* 132. Reported 6 *Howell's* State Trials, 1189.

(*b*) 31 *Car.* 2. *c.* 2.

(*c*) 56 *Geo.* 3. *c.* 100.

(*d*) Vol. 3. p. 132.

because

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because no precedent could be found where the Chancellor had granted it in vacation. *Blackstone* refers to Lord *Nottingham*'s manuscripts, of which some few copies are in private hands, but the only printed account of *Jenkes*'s case is contained in the State Trials. (*a*) It there appears, that *Jenkes* having been committed to prison by the Privy Council, during the long vacation, for a speech uttered by him on the hustings at *Guildhall*, a motion was made on his behalf at one of the seals after *Trinity* term, 1676, for a *habeas corpus*, on the authority of Lord *Coke* (*b*), " but the Lord Chancellor, making light of the Lord *Coke*'s opinion, saying that Lord *Coke* was not infallible, and slighting all that Mr. *Jenkes*'s counsel offered, over-ruled the matter, denying to grant the writ." (*c*)

High as is the reputation of Lord *Nottingham*, his decision in this instance cannot be supported by principle or authority. Unlike the courts of common law, this Court is not open in term only; the Chancellor sitting in vacation at the seal, is invested with all the jurisdiction incident to his office. For that reason various authorities expressly ascribe to him the power of issuing the writ of *habeas corpus* in vacation.

In the chapter of the fourth Institute which treats of the Court of Chancery, Lord *Coke* says, " And this Court is the rather always open, for that if a man be wrongfully imprisoned in the vacation, the Lord-Chancellor may grant a *habeas corpus*, and do him justice according to law, where neither the King's Bench nor Common Pleas can grant that writ but in the term time; but this Court may grant it either in term time or vacation."

(*a*) Vol. 6. p. 1189. (*b*) 2 *Inst.* 53. 4 *Inst.* 88. 182. 290.
(*c*) 6 *Howell*'s State Trials, 1196.

tion." (*a*) In a subsequent passage of the same book he mentions, as the readiest remedy for unjust imprisonment, "*Habeas corpus* in the term time, or in the vacation out of the Chancery." (*b*) And in the commentary on *magna charta* he uses these emphatic expressions, "The like writ (of *habeas corpus*) is to be granted out of the Chancery, either in the time of the term (as in the King's Bench), or in the vacation; for the Court of Chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject being wrongfully imprisoned, may have justice for the liberty of his person as well in the vacation time as in the term." (*c*)

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Lord *Hale*, an authority on such questions equal, perhaps superior, even to Lord *Coke*, with no less explicitness asserts the right and duty of this Court to issue the writ in vacation. "By virtue of the statute of *magna charta*," he says, "and by the very common law, an *habeas corpus* in criminal cases may issue out of the Chancery; but it seems regularly this should issue out of this Court in the vacation time, but out of the King's Bench in the term time, as in case of a *supersedeas* upon a prohibition." (*d*)

For the same reason this Court, being always open, may grant prohibitions in vacation. The authority of Lord *Coke* is express that the Court of Chancery "may grant prohibitions at any time either in term or vaca-

(*a*) Page 81.

(*b*) Chap. 31. p. 182.

(*c*) 2 *Inst.* 53. The passage intended by the marginal reference to the year book, "4 *Ed.* 4.," seems to be fol. 20, 21. The Courts of Common Pleas and King's Bench being adjourned by reason of pestilence, it is there stated that the Court of Chancery was not adjourned, "*car le Chancerie est tout temps overt.*" See post, p. 44.

(*d*) Pleas of the Crown, v. 2. p. 147.

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tion (*a*):" and in a recent case, the Lord Chancellor of *Ireland* refused a prohibition in term, on the ground that this Court should not entertain the application while the other courts are open (*b*); reserving therefore, as its peculiar jurisdiction, the right of issuing the writ in vacation.

What is opposed to the weight of these authorities? A report, which seems not very accurate, that Lord *Nottingham*, on a case arising in times of great violence, declared that Lord *Coke* was not infallible, and finding no precedent of the writ granted in vacation, refused it. At least the want of precedents cannot be alleged in the present instance; the greater part of the writs of *habeas corpus* at common law issued by this Court in late years have been granted in vacation.

Jenkes's case may, according to a prevalent notion (*c*), have been the occasion of the *habeas corpus* act (*d*); but that statute was designed not so much to confer new rights on the subject, as to provide new remedies for ancient rights. No clause gives to this Court the power of issuing the writ in vacation; but the whole frame of the

(*a*) 4 *Inst.* 81., and see *Blackborough* v. *Davis*, 1 *P. W.* 43. *Anon.* 1 *P. W.* 476. *Iveson* v. *Harris*, 2 *Ves.* 257.

(*b*) *Montgomery* v. *Blair*, 2 *Schoales & Lefr.* 136. In *Ex parte Lynch*, *July* 25, 26, 1815, on a petition for a prohibition to the Prize Court, the Vice-Chancellor in giving judgment said, "The first objection to this petition is, that the application is too late, the petitioner having had an opportunity to apply to a court of common law in term. Did this objection stand alone, I should feel great difficulty in refusing the writ, for it is one to which the subject has a right, and which the Court, a proper case being shown, is bound to issue *ex debito justitiæ*. For that purpose this Court, through the whole year, exercises at least concurrent jurisdiction; and perhaps the application may with peculiar propriety be made here, as in the *officina brevium*." *MS. S. C.* 1 *Madd.* 15. *Coop.* 325.

(*c*) 6 *Howell's* State Trials, 1208. *n.*

(*d*) 31 *Car.* 2. *c.* 2.

the act assumes the existence of that power. The third section applies only to persons committed during vacation, whom it entitles to the writ, upon production, or oath of denial, of a copy of the warrant of commitment and detainer; but instead of proceeding to give a general power of issuing the writ in vacation, the next section limits the provisions of the former to the case of persons who have not neglected to apply for the writ during two terms. The tenth section inflicts penalties on the Chancellor, or any other judge, denying the writ in vacation, on production, or oath of denial, of a copy of the warrant; a clause obviously intended only to enforce the third section. But the act nowhere contains a general authority for granting the writ in vacation; and strange indeed would it be, were so important an enactment found in a statute, the preamble of which refers not even to a doubt on the subject.

The question in this case may be decided by a reference to the statutes of bankruptcy. The 5 *Geo.* 2. *c.* 30. *s.* 18. provides, that in case any person committed by the commissioners shall bring any *habeas corpus*, in order to be discharged from any such commitment, a mere insufficiency in the form of the warrant shall not prevent a recommitment. A statute framed for providing a review of the exercise of a jurisdiction the most delicate and dangerous that can be confided to a court, must be construed in a manner to secure to it the most ample efficacy. On such a construction this clause must be understood as conferring on the subject a right to the writ, without restriction of time or court.

Mr. *Rose* in reply.

On the question whether this Court can issue a writ of *habeas corpus* in vacation, few authorities exist: but the result of those authorities, as stated by the counsel for

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for the prisoner, is not such as has been deduced from them by text writers. *Blackstone* clearly considers the dicta of Lord *Coke* and Lord *Hale* as overruled by the decision of Lord *Nottingham*.

The LORD CHANCELLOR.

Has *Blackstone* stated by what authority the Chancellor issues the writ in term, if he cannot issue it in vacation? His Court is open every day of his life, at the pleasure of any suitor.

Mr. *Rose.*— *Blackstone* has not engaged in the discussion of a question, which he considered as concluded by the deliberate judgment of that high authority.

The LORD CHANCELLOR.

The writ of *habeas corpus* under the statute 31 *Charles* 2. *c.* 2. is perfectly different from the writ at common law, and opens to different consequences; and the differences are so familiar, that on application to the offices from which the writs issue, they always adapt the writ to the occasion. With respect to writs at common law, the difficulty does not now occur for the first time. I have formerly experienced difficulties arising from a variation in the practice; bankrupts being brought up, sometimes by writ, sometimes by order; and I then thought that the writ of *habeas corpus* might be issued by this Court in vacation, and if so, that it was not wholesome to substitute an order for an old common-law writ (*a*), which affords perhaps to the person brought up, better security for his liberty than the process for punishing disobedience of an order of the Chancellor.

(*a*) Ex parte *Tomkinson*, 10 *Ves.* 106.

The

The reason of the common law courts not granting the writ in vacation is, that there is no common law court but in term time. On the question put to the Judges at a former period (*a*), the majority were of opinion that the Judges in the Courts of King's Bench or Common Pleas could not issue the writ in vacation. On that occasion they did not refer to the Chancellor, and for this reason, that his Court being not a term court, but always open (*b*), there seemed no ground for saying that he can grant the writ in term time and not in vacation.

The Court of Chancery is always open.

Jenkes's case was decided by one of the ablest men that ever sat in any court in this country. I have in my possession an authentic copy of Lord *Nottingham*'s manuscript reports, which belonged to the late Chief Baron *Thompson*, and I will see what is to be found there; but the modern text-books, and with reference to more authorities than have been cited, maintain that the Chancellor can issue the writ in vacation; and though by the statutes 16 *Charles* 1. *c*. 10., 31 *Charles* 2. *c*. 2. and 56 *George* 3. *c*. 100., the liberty of the subject appears to be properly secured through all future times, it should seem that there was a great defect in the law, if during the long interval between *magna charta* and the 31 *Charles* 2., the subject could not, in vacation, have obtained the writ. My opinion, formed not on this occasion, is, that the Chancellor has the power of granting a writ of *habeas corpus* at common law in vacation. The writ under the statute 31 *Charles* 2. *c*. 2. cannot be granted after neglect of application during two terms; but the rights of the subject under the one writ and under the other are very different. Much better security is afforded by the last, more particularly from the penalty of 500*l*. inflicted on

(*a*) In 1758. *Vide post*, p. 60. *et seq*.

(*b*) See 6 *Ves*. 771. *post*, p. 21. 22.

a judge

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Penalty on a judge denying the writ of *habeas corpus*.

a judge denying the writ; a penalty to which he is liable even if the denial proceeds on the most honest doubt. According to the law and usage of *England*, the usage constituting the law, at this day the Chancellor has a right to issue this writ in vacation.

July 14.

Jenkes' case.

The LORD CHANCELLOR.

I have found in Lord *Nottingham*'s MSS., a statement of *Jenkes*'s case, which certainly deserves great attention. It is as follows: " *July*, 28 *Car.* 2. *Francis Jenkes*, a prisoner in the *Gatehouse* by order of the council-board, moved me at the third seal for an *habeas corpus*, upon the authority of 2 *Inst.* 53., where it is said the subject hath remedy for his liberty in vacation time by *habeas corpus* out of Chancery, which is *officina justitiæ*, and always open. I directed Mr. *Welldon* his counsel, who moved it, to move it again this day, being the last seal, that in the mean time I might look upon the book and consider of it; which I did, and also advised with the Judges. And now, upon the second motion, I said my Lord *Coke* had indeed delivered such an opinion there, and again 4 *Inst.* 81. But in neither place had cited any one precedent of it, or authority for it, except the book of 4 *E.* 4. (*a*), which goes no further than to say, that when the term is adjourned, the Chancery is not adjourned. Which book is too weak a foundation to build such an opinion upon; for though the Chancery be *officina justitiæ*, and always open, for the granting of writs returnable in other courts in term time, yet no writs can be issued and made returnable in Chancery on the Latin side in time of vacation, for

(*a*) The margin of the MS. contains the following reference, " 27 Year Book, 4 *E.* 4."

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the Chancery is not open as a court of record to proceed in but in term time; and the prisoner doth not pray a *habeas corpus* returnable next term, but *immediatè*; which cannot be, for many reasons. For, 1st. Suppose the *habeas corpus* obeyed and returned, yet can no prisoner be bailed or discharged, till after the return be filed, and no return can be filed in vacation, because there is no Latin side to file it in. 2dly. If the *habeas corpus* be disobeyed even to the *pluries*, yet the attachment for that disobedience must be returnable next term, and perhaps in some other court too, directly parallel to the case of the prohibition which my Lord *Coke* puts in the same place, 4 *Inst.* 81., where he holds that the Chancery may grant a prohibition in time of vacation; but if it be disobeyed, the attachment upon that prohibition must be returnable next term, into the Court of King's Bench or Common Pleas. 3dly. For indeed there is no precedent of any *habeas corpus ad subjiciendum* made returnable in Chancery in term time, when perhaps it might be proceeded in, much less in time of vacation. 4thly. Had the law warranted such a proceeding, without doubt there would have been some practice of it, for there was occasion for it in *Chambers'* case (*a*), who was committed in 4 *Charles* 1. in time of vacation. 5thly. It is to be presumed that the stat. 17 *Car.* 1. *cap.* 14. (*b*), would have taken some notice of the Chancery, and have provided against the delays of *habeas corpus* there as well as in other courts, if that court had been proper for *habeas corpus* to issue from it. (*c*) 6thly. If the Chancery had any such standing

(*a*) *Cro. Car.* 133. 168.

(*b*) 16 *Car.* 1. c. 10.

(*c*) In the margin the following note occurs, " And it is to be noted that the act for abbreviation of Michaelmas Term (*d*) passed in this very session, to which act the objection was made, and was very obvious, that the prisoners in vacation would lie a fortnight longer before they could come to move for their *habeas corpus*, so that the parliament could not choose but take notice of the inconvenience, yet provided not against it."

(*d*) 16 *Car.* 1. *c.* 6.

power

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power in time of vacation, doubtless the whole vacation business of the Chancery would by this time have been nothing else but a gaol delivery for all *England*. 7thly. And then the late bill which passed the House of Commons for remedy of imprisonments in time of vacation (*a*), had been needless. For which reasons I did, as the judges had before advised me, put it upon precedents, without which they said it ought to be refused.

"The writ was not granted.

"A writ of mainprise appears to have been afterwards applied for: it was not granted; but in the beginning of *September* following, he was discharged." (*b*)

Lord *Nottingham* also states the circumstances of another proceeding before him, not noticed in the printed account. He says that a petition was presented to him on the *Monday* morning, as he was on his way to his coach, by certain *London* merchants, who styled themselves friends of *Francis Jenkes*, setting forth that *Jenkes* was a prisoner for a fact bailable, and that by the ancient usage of the Chancery, on putting in bail, a writ of mainprise ought to issue to deliver the party; and the petitioners offered themselves as bail; that the petition was accompanied by precedents, eighteen being stated of very ancient date; and that there came also a forward attorney, who brought a copy of *Fitzherbert's Natura Brevium*, and referred to page 250. Lord *Nottingham*, remarking that this was a captious application, for the prisoner did not complain, told the petitioners that on his humble petition he made no doubt that his Majesty would order *Jenkes* to be bailed; that

(*a*) See *post*, p. 29

(*b*) For the preceding copy of the statement read from Lord *Nottingham's* MSS. by the Lord *Chancellor*, the editor is indebted to his Lordship's favor.

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the present was not a time to give a farther answer, and that he would consider of it. On *Wednesday* following, Lord *Nottingham* stated the matter to the king in council; and considering that a subject of this nature ought not to rest on his single judgment, the granting or denying this writ being of great effect in his Majesty's government, he prayed a reference to the Attorney and Solicitor General. Lord *Nottingham* states what passed in council: the opinions of the judges were ordered to be taken, and three or four pages of great learning follow, in support of the opinion that the writ could not be granted, since the statute, 28 *Edward* the Third, c. 9. At length *Jenkes* was set at liberty, the King intimating his pleasure to that effect. (*a*)

After such an account of *Jenkes*'s case, of the authenticity of which no doubt can be entertained, giving a view of that decision very different from that which has prevailed, it is necessary to use great research in settling the question. Lord *Nottingham*'s distinction is, that though the Court of Chancery is always open, it is not always open as a court of record; the Latin side being open in term only: but it would be impossible to account for a great deal of what passes in this Court on that distinction.

I shall not determine the question, without giving to the bankrupt's counsel an opportunity of commenting on the reasoning and authorities by which Lord *Nottingham*'s decision is supported. Lord *Nottingham*'s objections are, that the Latin side of the Court, (by which I understand him to mean the petty bag,) is not open in vacation; and the difficulty of attaching parties in vacation for disobedience to the writ.

(*a*) For a farther account of *Jenkes*'s case, see *post*, p. 43—47.

I have

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I have directed inquiry into the proceedings in this Court by *habeas corpus*, and also in discharge of bankrupts from commitments by the order of the Chancellor on petition; for that has been done. The usage, as far as I can ascertain, is, that where the party is brought up by *habeas corpus* and discharged, the return is put into the jailor's hands as an authority for the discharge. It is unfortunate that the question is brought here, when no fewer than six judges are in town, about the power of every one of whom no doubt can exist.

July 15.

The following passage from Chief Justice *Wilmot*'s opinion, on the writ of *habeas corpus* was read by Mr. *Rose*.

"In 2 *Inst*. 53. and 4 *Inst*. 81. 182. Lord *Coke* says, "it ought to issue out of the Court of King's Bench in term time, and out of Chancery either in term time or vacation." All writs, in supposition of law, do issue in the term; and he might mean no more, than that judges could not grant them by their own proper authority, as separate and detached from the court, as they issue warrants. First, this was no judicial determination; a mere "*prolatum*," which, as to the Court of Chancery, is very doubtful. For no writ of *habeas corpus* can be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords. The 16 *Car*. 1. takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation. And the 31 *Car*. 2. seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th section expressly

pressly empowers the Court of Chancery to grant it, which would have been unnecessary, if it could have granted the writ before." (*a*)

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The Lord Chancellor.

July 16.

If the writ were issued under the statute (*b*), after the expiration of two terms, the bankrupt might reply to the exception in the third section, that the omission to make an earlier application was not wilful.

I have found that, previously to the statute 5 *Geo.* 2. c. 30., the *Chancellor* disposed of commitments by commissioners by order (*c*); but I cannot find any instance after that act; though I see nothing in that or the subsequent acts to exclude such a power if it previously existed.

With respect to Lord *Nottingham*'s observation on the difficulty in the issue and return of a *habeas corpus* in vacation, by reason of the *Latin* side of this Court not being then open, on the researches which I have directed in that *Latin* side, nothing has been found which throws any light on the subject; no return of this writ or any other.

Mr. *Cullen*, in support of the writ.

July 17.

Blackstone describes the writ of *habeas corpus* as "a high prerogative writ, and therefore, by the common law,

(*a*) Opinions and Judgments of Chief Justice *Wilmot*, p. 100, 101.

(*b*) 31 *Car.* 2. c. 2.

(*c*) See the instances, *post.* p. 30. *et seq.*

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issuing out of the Court of King's Bench, not only in term-time, but also during the vacation, by a *fiat* from the Chief Justice, or any other of the judges. (*a*)

The LORD CHANCELLOR.

I am sure that *Blackstone*'s opinion was, that though the law might be in a better state if the writ were issuable in vacation, that point was extremely doubtful. The best account of the writ of *habeas corpus* is to be found in the opinions of the judges, given to the House of Lords, on occasion of the bill for extending the provisions of 31 *Car.* 2. c. 2., introduced in the time of Chief Justice *Wilmot.* (*b*) The Court of King's Bench had always issued the writ in term-time; but it appeared, (I speak from memory, for I have not been able to find the papers,) that there had been a practice for the judges of that Court to issue the writ in vacation. The Courts of Common Pleas and Exchequer, being confined to civil matters, never issued the writ till empowered by statute. Many of the judges were of opinion that, at common law, the judges of the Court of King's Bench had no right to issue the writ in vacation; many thought that they had acquired that right by practice. By the late act (*c*) authority is given to all the judges to issue the writ in vacation; but had the question arisen some years ago, unless this Court, as *officina justitiæ*, had authority to issue the writ, any of the king's subjects might have lain in prison during the vacation.

Mr. *Cullen.*

Blackstone supposes the writ to be issuable in vacation by the judges of the Court of King's Bench: he says, if the writ "issues in vacation, it is usually returnable

(*a*) 3 *Bl. Com* 131. (*b*) *Vide post*, p. 60. *et seq.*
(*c*) 56 *Geo.* 3. c. 100.

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before the judge himself who awarded it." (a) It would be most extraordinary, considering the nature of the writ, designed as a summary mode of delivering the subject from imprisonment, while any judge of a court of common law could issue it in vacation, to deny a like authority to the Lord *Chancellor*. No one ever doubted his power to issue a *Habeas Corpus* returnable before himself, though some of Lord *Nottingham*'s reasons go to that extent; the only doubt is, whether he can exercise that power in vacation. The doubt originates in the single and anomalous case of *Jenkes*; a case not only decided under political circumstances, from the influence of which it was scarcely possible for any judge to deliver his mind, but, speaking with every respect to the memory of Lord *Nottingham*, decided by a judge who was himself a party. From the account of that case given in the State Trials, which is not inconsistent with Lord *Nottingham*'s MSS., it appears that he took an active part in the examination of *Jenkes* before the Privy Council, and put to him several most pressing questions.

The LORD CHANCELLOR.

By whom is that account given? I have seen so many accounts of proceedings before the Privy Council, not containing a word of what really passed there, that, without at present questioning the fact, I wish to know the authority.

Mr. *Cullen*.

The statement purports to proceed from *Jenkes*' friends. It remains, however, to consider the grounds of that case. Had the reasons of Lord *Nottingham* been good, it would have been unnecessary to refer his refusal to the want of precedents. The doctrine which Lord *Coke*

(a) 3 *Bl. Com.* 131.

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rested on constitutional grounds, Lord *Nottingham* controverts by narrow, technical, special pleading objections, derived from the distinction of the *Latin* and *English* sides of the court, and the filing and return of writs.

The Year Book, 4 *Edward* 4., which Lord *Nottingham* says, is too weak a foundation, going no further than to say, that when the term is adjourned the *Chancery* is not adjourned, will be found on examination a most material authority. In *Trinity* term, 1464, a pestilence prevailing in *London* and the neighbourhood, the Courts of King's Bench, Common Pleas, and Exchequer were adjourned to *Michaelmas* Term, not by act of parliament but by the King's writ; a proceeding by no means singular; many other instances occur in which the term has been adjourned by the King (*a*), and it seems therefore that the adjournment of the term depends upon the king's pleasure. The report states that the Judges of the Common Pleas having met in Court, caused the King's writ of adjournment to be read; the King's Bench was adjourned in like manner, and the Exchequer as to pleas of parties: but debtors to the King were to account there as usual; and the Book proceeds, "also the Chancery was not adjourned, for the Chancery is always open." (*b*) Why Lord *Nottingham* should have declared this too weak a foundation, I know not. It fully justifies the inference which Lord *Coke* deduces from it, and in principle decides the question; deciding that the Court of Chancery does not, like the other courts, depend on the term, but is always open; nor is there a pretence for saying that these expressions, which are applied to the whole Court, do not extend to the *Latin* side. That the

(*a*) See *Viner*, *Abr.* Adjournment, A., *Officina Brevium*, 7.

(*b*) 4 *Ed.* 4. fol. 20, 21. *Bro. Abr.* Brief, 349. Jurisdiction, 74.

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the *Chancellor* sits at one place in term, and at another in vacation, is an arrangement of mere convenience. The statutes abbreviating the terms (*a*), show that the Court of Chancery is not affected by the distinction of term and vacation. The courts to which those acts apply are described in them, as "the high courts of record of our Sovereign Lord the King, holden at *Westminster*, or other place or places at the assignment or appointment of the King." The Court of Chancery is not holden at any place by the appointment of the King, but follows the person of the individual having the custody of the great seal. The correlative words, term, and vacation, have no application to the Court of Chancery, which knows no vacation. Lord *Nottingham*'s objection, therefore, that the writ cannot be returned in vacation, because the *Latin* side of the Court is not then open, is an assumption contrary both to the authority of the text-writers cited, and to the fair inference to be drawn from these statutes. Probably Lord *Coke* and Sir *Matthew Hale*, in concurrence, possess a better claim to infallibility than Lord *Nottingham* alone.

The second reason, that if the writ is disobeyed, the attachment can be returnable only in term time, seems answered by the same authorities.

The LORD CHANCELLOR.

What proceedings on the *Latin* side of the Court can be taken only in term.

You will find, I believe, that, in suits in the petty bag, which is the *Latin* side of the Court, these steps can be taken only in term time. If an action were brought there, a declaration could not be filed, or plea

(*a*) *Trinity* term is abbreviated by stat. 32 *H.* 8. *c.* 21., and *Michaelmas* term by 16 *Car.* 1. *c.* 6. and 24 *Geo.* 2. *c.* 48.

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put in, or issue joined, in vacation. (*a*) On these points I will direct inquiry. With reference to some of the passages which you have cited, it may be material to recollect, that Lord *Coke* took a conspicuous part in the question relative to the antiquity of the equity side of the Court of Chancery, warmly contending for its modern origin. (*b*)

Mr.

(*a*) " As this is a judgment, and by the practice of the *Petty Bag* no judgment can be given but in term time, let it be drawn up the next term." Lord *Hardwicke*, *Ex parte Armitage* and others, *Ambl.* 296. Some old authorities maintain, that, " as to the law proceedings, the King's Bench and Chancery are but one court." 10 *Ed.* 3. 59. 2 *Rolle, Rep.* 291. 349., cited by Sir *Robert Atkyns*, Inquiry into the Jurisdiction of the Chancery, p. 4. A similar expression occurs in some accounts of the argument and judgment in *Jeffreson* v. *Morton*, 1 *Sid.* 436, 437. 1 *Lev.* 283. 1 *Mod.* 29. 2 *Keb.* 529. 584. 587. 608. 621. 3 *Keb.* 25. 31. 33. 129. 243. 2 *Saund.* 23.; See *Fraser* v. *Lloyd*, *Coop.* 187. 19 *Ves.* 317.

In *Bro. Abr.* voc. Jurisdiction, pl. 116., it is said, " *Nota que le Chauncery poet escrier al major de* Calyce, *et bre de error issera del Chauncery a* Calyce *de judgment done la, et le Chauncery poet tener ple sur scire facias et auters tiels bres queux appertcigne a eux, si bien extra terminum quam infra terminum. Novell Natura brevium de Fitzh.*" The reference in the margin to the Year Book 21 *H.* 7. 33. seems applicable only to writs of error directed to *Calais*. This passage in *Brooke* is cited by *Crompton* on Courts, 42. a.

(*b*) The following accurate summary of this controversy, so important in the history of our equitable jurisprudence, was prepared by Mr. *Hargrave* for the Life of Lord Chancellor *Ellesmere*, published in *Kippis's Biographia Britannica*. Some additional references, supplied by the Editor, are placed between brackets: —

" Whether the Chancery can relieve by subpœna after a judgment at law in the same matter, was the chief point in controversy between Lord

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Mr. *Cullen.*

The officers of the Petty Bag, may have accommodated their practice to the periods of business in other courts: if

Chancellor *Ellesmere* and Lord Chief Justice *Coke*. The latter resisted the equitable interpositions on various occasions. In one case, the King's Bench, whilst he presided over it, made a judgment absolute, and granted execution in spite of an injunction from Chancery. (*a*) In another case, he, and the other judges of the King's Bench, first bailed and afterwards discharged one, who had been committed for disobedience to a decree in Chancery, where that Court interposed after a judgment at law. (*b*) In a third case. where the defendant in Chancery, having been committed for contumacy in not answering, was brought by *habeas corpus* before the King's Bench, *Coke* held a language, which made it apparent, that he would have gone the same length, if it had been clear that the bill in Chancery was for the same matter as the judgment at law; and in this he was strongly seconded by Judge *Doderidge*. (*c*) The grounds on which Lord *Coke* thus proceeded are stated by himself, both in his third and fourth Institutes. (*d*) Certain also it is, that he did not act without at least the colour and semblance of precedents and authorities in his favour. In the reign of *Edward* IV., *Hussey*, Chief Justice of the King's Bench, avowed that, if the party imprisoned by Chancery in a like case required it, he would have acted on the same line of conduct. (*e*) In the reign of *Henry* VIII., Sir *Thomas More*, whilst he was Lord Chancellor, joined the House of Lords in charging it as a crime against Cardinal *Wolsey*, that he had examined matters in Chancery after a judgment at law. (*f*) In the even the most

(*a*) Cro. Jac. 335.

(*b*) Cro. Jac. 343. [*Moor*, 838. 1 *Rolle, Rep.* 111. 219. 2 *Bulstr.* 301. For an account of the fraud practised by the plaintiff at law, which induced the Chancellor to interfere, see *Wilson's Life of James* I. p. 94, 95.]

(*c*) 3 *Bulstr.* 115. [1 *Rolle, Rep.* 277.]

(*d*) 3 *Inst.* 122. and 4 *Inst.* 185.

(*e*) 22 *E.* 4. 37.

(*f*) 3 *Parl. Hist.* 42. [1 *New Parl. Hist.* 492—501. 4 *Inst.* 89. 95.]

 zealous

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if writs are to be returned in those courts, they must be made returnable in term, and that convenience of arrange-

zealous advocates for the equitable jurisdiction of Chancery disavowed the right to interfere after a judgment at law, as is* evident from the writings of the author of *The Doctor and Student.* (a) In the reign of *Elizabeth*, three indictments of *præmunire* on the statute of 27 *Edw.* 3. are stated to have been found against different persons for obtaining subpœnas after judgment at law; one in the 8 & 9 *Eliz.* whilst Sir *Nicholas Bacon* was Lord Keeper; a second in 27 *Eliz.* whilst Sir *Thomas Bromley* held the seals; and a third in 30 *Eliz.*, in which last instance it is represented that the Court of King's Bench, on exceptions taken, decided that the case was within the statute, though they quashed the indictment for mistake of a name. (b) These cases are also said to have been followed by another, of the 39 & 40 *Eliz.* in which, on a demurrer to a bill in Chancery, after judgment at law, there was a reference to all the judges of *England*, who are stated to have concurred in certifying that the demurrer was good. Sir *Moyle Finch*'s case. (c) Whether the weight of authorities, and of the reasoning independently of them, did, on the whole, preponderate for or against Lord *Coke*, is a point upon which it would be rash to pronounce, without a very close and accurate investigation. In the mean time, it must be confessed, that, without taking into account the high estimation of the venerable Lord *Elles-*

(a) [See the tract concerning suits by subpœna, annexed to the later editions of that dialogue, and inserted in *Hargrave*'s Law Tracts, p. 321. *et seq.*]

(b) 3 *Inst.* 124.

(c) *Ibid.* [And see *Cary, Rep.* 4. 2 *Leon.* 115. 116. 3 *Leon.* 18. *Dal.* 81. *Moor*, 916. 2 *Brownl.* 97. *Godb.* 244. 1 *Rolle, Rep.* 71, 72. 252. 2 *Bulstr.* 194. 284. 3 *Bulstr.* 118. 120. *Cro. Car.* 595, 596. *Style.* 27. *Crompton on Courts*, 41. b. A case in the Common Pleas, 2 *Car.* 1., in opposition to these authorities, proposes the doctrine which has eventually prevailed. "*Si judgment soiet done in un action al common ley, le Chancellour ne poet alter ou medle ove le judgment, mes il poet procede versus le person pur corrupt conscience, quia il prender advantage del ley encounter conscience.*" *Littleton's Rep.* 37.]

mere's

arrangement may explain the practice, if such exists, of making all writs returnable in term only, and suspending 1818. Crowley's Case.

mere's character, there is seemingly great presumption in favour of his side of the controversy; for it not only terminated with a decision against Lord *Coke*, but that decision, notwithstanding various attempts to unhinge it, still operates with full force. The decision against Lord *Coke* was in 1616, when the Attorney-General *Bacon*, the Solicitor-General, and the King's Serjeants, having certified in favour of Chancery on a case referred to them by the Crown, King *James* declared his approbation, and issued a rule for direction of Chancery accordingly. (*a*) Nor was this the full extent of Lord *Ellesmere*'s victory; for Lord *Coke* was called to a severe account for his conduct in this strife about jurisdiction, and found it convenient to make a very humiliating submission. However, it appears by the third Institute, that Lord *Coke* considered the victory as obtained by undue means, and did not really relinquish his original notions on the subject. (*b*) Such was the effect of King *James*'s decision in favour of equitable jurisdiction, that Lord *Coke* did not live to see a revival of the attempts to check it. But within a few years after Lord *Coke*'s death, the question of equitable jurisdiction was again stirred, and, as it seems, not wholly without success. In 17 *Cha.* 1. it is reported to have been agreed in the King's Bench, that a court of equity could not relieve after judgment at law. (*c*) In 1655, the like

(*a*) [The proceedings on this reference may be found in the argument on the Jurisdiction of the Court of Chancery, annexed to the first volume of *Reports in Chancery*, (reprinted with corrections, in 1 *Collectanea Juridica*, 23. *et seq.*, and in *Cary's Reports*, p. 163. *et seq.*) and further particulars of the controversy in *Bacon*'s Works, vol. v. p. 575. 385. 415. *et seq.* For some strictures on the prerogative exercised by *James* in this instance, see Sir *Robert Atkyns*, Inquiry into the Jurisdiction of the Chancery in Causes of Equity, p. 46. 47.]

(*b*) 3 *Inst.* 125.

(*c*) *March's Rep.* 183. [This reference is incorrect; the case intended probably is p. 83. pl. 138., and see p. 54. pl. 81. 15 *Car.* 1.]

question

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ing proceedings during vacation: but in principle, this Court, in all its functions, is equally open through every period of the year.

The

question was moved against the equitable jurisdiction of the Exchequer, and a demurrer to a bill after judgment at law was there allowed. (*a*) In 1658, another case was argued in the Exchequer on the same point: but no judgment appears to have been given. (*b*) After the Restoration there occurred on this subject the two cases following; namely, *King* v. *Standish* (*c*), and *King* v. *Welby*. (*d*) The former was a case of demurrer on action of *præmunire* in the King's Bench. It began whilst *Kelynge* was Chief Justice; who, after argument, thought it a fit case for adjournment into the Exchequer Chamber. (*e*) But, afterwards, when Lord *Hale* was become Chief Justice, he is said to have held that the case was not within the statute of *præmunire*, on which nothing farther was done in the case. (*f*) In the latter case, a judgment at law has been pleaded to a bill in Chancery: and, on the plea's being overruled, a prohibition was moved for in the King's Bench, when Lord *Hale* recommended that it should be moved in Chancery to have the plea set down again; and he said, that, if it should be over-ruled again, then the Court would consider whether a prohibition should be granted. (*g*) Thus rested the dispute till 1695, when it was once more revived by Sir *Robert Atkyns*, who, almost immediately after resigning the office of Lord Chief Baron, published an elaborate treatise against the equitable jurisdiction of Chancery, in which he particularly insisted that it could not interpose after a judgment at law. This treatise he addressed to the Lords; but, as far as appears at present, neither this nor a subsequent publication in 1699, by Sir *Robert* on the Jurisdic-

(*a*) *Morel* v. *Douglas*, *Hardr.* 25.

(*b*) *Harris* v. *Colliton*, *Hardr.* 120.

(*c*) 2 *Keb.* 402. 661. 787. 1 *Mod.* 59. 1 *Sid.* 463. 1 *Lev.* 241.

(*d*) *Sir Thomas Raym.* 227. 3 *Keb.* 221.

(*e*) 1 *Mod.* 61.

(*f*) 1 *Lev.* 243.

(*g*) *T. Raym.* 227.

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The third reason is most extraordinary as an assertion of a fact, and, as an argument, proves too much. Lord *Nottingham* says, that he finds no precedent of an *habeas corpus ad subjiciendum* returnable in Chancery in term time, when perhaps it might be proceeded in, much less in time of vacation. Could Lord *Nottingham* mean that the Lord Chancellor never issued a *habeas corpus* returnable before himself in term time? If not, the proposition is nugatory, and to that extent it is quite untenable. The fourth objection is, that if the law warranted such a proceeding, there would be some practice of it; for there was occasion for it in *Chambers'* case, That case is reported in *Croke* (a), but it does not justify the observation. The reason that there was no application to the Chancellor in that case is obvious. *Chambers* having obtained a writ of *habeas corpus* in the King's Bench, the marshal returned that he was committed on the 28th day of *September*. At that time *Michaelmas* term began early in *October*. Considering, therefore, that the interval between his commitment and the commencement of the term exceeded not a few days, his omission to apply to this Court for a writ in vacation may well be explained without the supposition of a defect of jurisdiction. There is a good general reason also for forbearing to make the application to the Lord Chancellor, which may account for that want of precedents to which Lord *Nottingham* attaches so much im-

(a) *Cro. Car.* 133. 168.

tion of the Peers, in which he again inveighed against Chancery, produced the least effect: on the contrary, the jurisdiction of equity, as well after as before judgment, has been ever since exercised without controversy or interruption." (a)

(a) [Some valuable strictures on Sir *Edward Coke*'s objections to the antiquity of the equitable jurisdiction of the Court of Chancery may be found in *Wooddeson*'s Lectures, i. 176. *et seq.*]

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portance. Commitments are commonly for criminal, or supposed criminal matter; if the Lord *Chancellor*, on the return of the writ, found that the party was committed for a bailable offence, he could not discharge him, and bail could be taken only in the other court; the *Chancellor* being unable to proceed in a criminal matter, the return must be made in the King's Bench. The practice of applying to that Court, therefore, became almost universal; nor could any benefit in such cases be obtained by an application to the Lord *Chancellor* in vacation.

Lord *Nottingham* then refers to the statute 17 *Car.* 1. c. 14., meaning 16 *Car.* 1. c. 10. (*a*), and argues that that statute would have provided for delays in granting the writ in Chancery, as well as in other courts, if this court had been competent to grant it. But the object of that act was the abolition of the Court of Star-Chamber; and the provision for issuing a writ of *habeas corpus* was merely incidental, and confined to cases of commitment by the order of any court pretending a like jurisdiction; for those cases it provides against delay in the remedy by writ to be obtained from the King's Bench or Common Pleas. The jurisdiction of particular courts was not in question. The sixth reason is, that if the Chancery had any such standing power in time of vacation, doubtless the whole vacation business of the Chancery would by this time have been nothing else than a gaol-delivery for all England. Considering the nature of the commitments at that time, namely, for insolent speeches before the council, and turbulent speeches at *Guildhall*, charges of which the *Chancellor* could take no cognizance, this apprehension seems rather gratuitous. Of the bill which had then recently passed the House of Commons, and

(*a*) See sect. 8.

stands

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stands as a seventh reason, I know nothing. (*a*) The observation in the margin, that the act for the abbreviation of *Michaelmas* Term passed in that very session, to which act the objection was made, that the prisoner would lie a fortnight longer in vacation, applies to those persons only who had recourse to courts of common law. It was true that an application to the Court of King's Bench would be delayed; and that objection exists, although the *Chancellor* is competent to issue the writ in vacation.

Considering, therefore, the situation of the judge, and the reasons which he assigns, no authority can be ascribed to this decision. The principal ground on which, as Lord *Nottingham* says, he was advised to put it, namely, the want of precedents, was a mere pretence, and most untrue; and the conclusion is expressly contradicted by the opinions of Lord *Coke* and Sir *Mathew Hale*, adopted by subsequent text writers. (*b*)

In the present instance, the bankrupt was committed four days after the term began; this therefore is not a case of commitment in vacation, within the statute; and the writ, if issuable at all, can be issued only at common law.

The Lord *Chancellor* having read an entry of the result of an application to Lord *Loughborough* in 1797, in

(*a*) Lord *Nottingham* probably referred to the *habeas corpus* act, which originally passed the House of Commons in 1674, (New Parliamentary History, v. 4. p. 665.) though it did not receive the royal assent till 1679. (Id. p. 1148.)

(*b*) *Bac. Abr. Hab. Corpus* B. *Com. Dig. Hab. Corpus* A. In *Shephard's* Abridgment, it is stated that the *Latin* or legal part of the court of *Chancery* "consists in the granting of writs of *habeas corpus*, which no other court can grant in vacation time," &c. *Voce* Court, part I. p. 464.

Nowlan's

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Nowlan's case, in which the discharge of the bankrupt was refused, Lord *Loughborough* expressing an opinion that he had no jurisdiction (*a*); proceeded thus:

Speaking with great deference to Lord *Loughborough*, it appears to me that this reasoning is wrong. I find that it was the practice before the statute 5 *Geo.* 2. c. 30., for the Lord *Chancellor* to discharge prisoners under commitment from commissioners of bankrupt, by order; and it seems clear that that act has not deprived this court of the authority which it then possessed. It is to be observed also, that the application in *Nowlan's* case was within two terms after the commitment; and the Lord *Chancellor* therefore should not have stated that the only mode of obtaining the prisoner's discharge was by application to a common-law judge. I think that that must have been the mistake of the person who sat under the Lord *Chancellor*.

Instances in which the Lord Chanlor, on petition, has ordered the discharge of prisoners committed by commissioners of bankrupt.

This Court has, in several instances, on petition, ordered the discharge of persons committed by the commissioners; sometimes ordering the commissioners to discharge him, sometimes the jailer, passing over the commissioners.

The instances, however, are not numerous. One of the earliest is *Ex parte James* in 1719. (*b*) In *Ex parte*

(*a*) On diligent search in the office of the secretary of bankrupts, this entry has not been found.

(*b*) 1 *P. W.* 610. For copies of the entries in this and the following cases the Editor is indebted to the obliging attention of Mr. *Pensam*: — " Lord *Chancellor Parker*. 21 *July*, 1719. *Ex parte James*. — Wife committed by commissioners for refusing to prove her husband a bankrupt. Lord *Chancellor* said he knew of no law to compel a wife so to do, and ordered the jailer forthwith to discharge her from the commissioners' warrant."

Ling-

Lingood (*a*), on the petition of a bankrupt committed by one of the common-law judges on the certificate of the commissioners of his refusal to attend their summons (*b*), Lord *Hardwicke* said, "It is an entire new question, and quite a new case; and therefore at the first opening of it I had a great doubt, whether I could properly determine the legality of the commitment, as a *habeas corpus* might have been sued out, and have been decided by the judges of the common law, which is the ready way. But I do remember a case of *John Ward*, before Lord *Chancellor King*, not unlike the present, where he determined a commitment by commissioners of bankrupt to be justifiable, after he had taken some time to consider of it."

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A like practice occurred in *Ex parte Brailsford*, 13th *October*, 1725 (*c*), and in the bankruptcy of *Thomas Mace*, in *September* and *December*, 1728. (*d*)

Mr. *Cul-*

(*a*) 1 *Atk.* 240. See p. 242. (*b*) 5 *Geo.* 2. c. 30. s. 14.

(*c*) *Lord* CHANCELLOR.

Decimo tertio die Octobris, 1725, *ex parte Thomas Brailsford et Robti Castell et Johi Rogers.*

Whereas *Thomas Brailsford* did, on the 11th day of *August* last past, prefer his petition to me, thereby setting forth, that a commission of bankruptcy issued against him the 4th day of *February*, 1722, directed to sundry commissioners therein named; that the petitioner was several times examined by them upon oath, touching the discovery of his estate and effects, and made a full discovery thereof, and delivered up the same, and that the petitioner apprehended he had complied in every respect, to the satisfaction of the said commissioners, yet the commissioners did, by their warrant dated 7th of *May*, 1723, commit the petitioner to the prison of the Fleet, there to remain till the petitioner submitted to be examined, and there the petitioner hath ever since been

(*d*) See note, p. 38.

a close

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Mr. *Cullen.*

It was understood that your Lordship in *Taylor's* case (*a*), had decided that a bankrupt under commitment

(*a*) 8 *Ves.* 328., and see *Ex parte Tomkinson,* 10 *Ves.* 106. *Ex parte Hiams,* 18 *Ves.* 237.

a close prisoner; that the petitioner was always ready to be further examined, as the said commissioners should require, and of such his submission and readiness gave notice to the said commissioners, and particularly by a letter dated 5th *March* last, but the said commissioners not taking any notice thereof, the petitioner applied by his petition to the late lords commissioners for the custody of the great seal, praying their lordships to direct the said commissioners, by some short day, to further examine the petitioner, and thereupon discharge the petitioner from his imprisonment, unless they should see good cause to the contrary, to be by them certified in writing to their lordships; upon hearing of which petition, on the 7th of *April* last, their lordships ordered, that the commissioners or the major part of them, upon application to be made to them on behalf of the petitioner and notice of the said order, should appoint a time and place of meeting for the further examination of the petitioner, of which notice was to be given in the *London Gazette,* which was accordingly given, and appointed to be on the 5th day of *May* last, upon which day the commissioners adjourned the petitioner's further examination to the 7th of the same month, at which time the commissioners further examined the petitioner, and again adjourned to the 11th of *May,* when the commissioners finished the petitioner's examination; and the petitioner, after having been examined, entreated the said commissioners to release him from his confinement; whereupon the commissioners assured the petitioner they were ready so to do if the assignees thought fit; and that the petitioner then represented to the commissioners, how hard it was that he should suffer imprisonment, notwithstanding he had fairly answered all the questions that had been propounded to him; and the commissioners thereto replied, they believed he had not concealed a groat from his creditors, and did not make

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ment for not answering, could not be discharged on petition, but must obtain a writ of *habeas corpus*. That rule

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make any objection whatsoever against the petitioner's behaviour or examination, or that they were the least dissatisfied therein, but ordered the petitioner to withdraw, and after some short time the petitioner was again called in before the said commissioners, and then he was told by the said commissioners, that they could not release the petitioner, but that he must have a little patience, or to that effect, and expressed themselves sorry for the ill state of health the petitioner was then in, and which (as the petitioner believed) was occasioned by his confinement; that the petitioner had, ever since the 7th of *May*, 1723, been confined within the walls of the said prison, and was thereby reduced to a languishing state of health, and without my interposition was like to be a prisoner for life, which was in danger of being shortened by such his imprisonment; the petitioner therefore prayed that I would order the said commissioners to discharge the petitioner from his said imprisonment, or that I would make such order as to me should seem meet. Whereupon I ordered all parties concerned, or their agents, to attend me on the matter of the said petition, the then next day of petitions, whereof notice was forthwith to be given; and whereas *Robert Castell* and *John Rogers*, assignees of the estate and effects of *Thomas Brailsford*, a bankrupt, and *Samuel Clark*, *Benjamin Bond*, *William Parkin*, *John Robinson*, *Samuel Prune*, and *Joseph Hall*, creditors of the said bankrupt, did on the said 11th day of *August* last past, prefer their petition to me, thereby setting forth, that upon the 4th of *February*, 1722, a commission of bankruptcy was awarded against the said *Thomas Brailsford*, and the said *Brailsford* was several times examined before the major part of the commissioners in the said commission named; that it appeared upon such examinations that all the bankrupts estate and effects whatsoever had been, upon the 3d and 4th of *January* preceding the said commission, assigned unto Mr. *George Brailsford* and Mrs. *Jane Perkins*, two of his near relations,

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rule is consistent with Lord *Loughborough*'s decision in *Ex parte Nowlan*. The question, however, is not material

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relations, and that on the 10th of *October* 1722, an account was stated between the said *Thomas* and *George*, and the balance thereof was the sum of 1000*l*. to the said *George Brailsford*, and that on said 10th of *October* 1722, the said *Thomas* gave *George* his bond for payment of the said 1000*l*., at the end of 6 or 12 months after the date thereof, and that before the time the said money became due on the said bond, the said *Thomas* confessed a judgment for 1000*l*. on a *mutuatus* to the said *George Brailsford*, but the said *George* never delivered up or any ways cancelled the said bond, and that at the said time, the said *Thomas* assigned over several debts, and the lease of his house, to the said *George*, without any defeazance on the part of the said *George Brailsford*; but it did not appear by the books of the said bankrupt, that the sum of 1000*l*. or any such sum was due from the said *Thomas* to the said *George Brailsford*; that the commissioners examined the said *Thomas Brailsford* touching the disposition of a sum of 1600*l*. which he had received of the petitioner *Rogers* at one time, and about several other of his effects, of which he giving no satisfactory account, the commissioners committed him close prisoner to the *Fleet*; and upon the said bankrupt's application to the late Lord Chancellor, in *July*, 1724, to be discharged from such commitment and to have his certificate allowed, his lordship, upon examination of the matter, approved of the commissioners' proceedings, and utterly refused to allow his certificate, or to discharge him from the commitment; in the mean time, the petitioners,(the assignees,) filed their bill in this court against the said *George* and *Thomas*, to be relieved against such judgment and assignments, and prayed a discovery when the bond for 1000*l*., given by *Thomas* to *George* was payable, and to come to a fair account with the petitioners, to which bill the defendants *George* and *Thomas* put in their answer; and upon hearing counsel on bill and answer, the court granted an injunction to stay the defendant *George*'s proceedings on his said judgment, and ordered the

terial to the present case, the bankrupt being brought before the Court by writ of *habeas corpus*.

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The

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the monies which the goods taken in execution amounted to, to be brought into court, where it remains; on the 8th of *December* last the cause came on to be heard before the then Lord Chancellor, who, as the petitioner apprehended, was fully of opinion that if such bond was not payable till after the warrant of attorney and execution taken by the said *George*, (which by the bankrupt's depositions appeared it was not,) that the said judgment and assignments were fraudulent, and ought to be set aside, and that it did not appear that the said balance of 1000*l*. was really due to the said *George Brailsford*, and therefore directed the master, to whom the cause was referred, to look into the accounts between the said *Thomas* and *George*, and inquire into the said bond, from the said *Thomas*, for payment of 1000*l*. to the said *George*, and to state when the said 1000*l*. was made payable, whether before or after the warrant of attorney to confess judgment from defendant *Thomas* to the defendant *George*, and that both sides should be examined on interrogatories, as by the said decree might appear; in *April* last, the said *Thomas Brailsford* petitioned the Lords Commissioners, in order to his discharge, and to be further examined before the said commissioners, which examination their Lordships granted, and ordered that, at such his examination, he should have the sight of all his books and papers of accounts, and his depositions, before he gave in such his second examination; on the 7th of *May* last the commissioners attended him again with all his books, papers, and his former depositions, and then shewed him the depositions of said *George Brailsford*, on the 7th of *May* 1723, which related to the time of payment of the said bond to the said *George*, and to the assignment of his effects, and asked whether he could recollect any thing that varied from those depositions; and the said *Thomas* thereupon carefully perused the said depositions, and swore that such depositions were just and true as to every particular, and declared that he could not depart from

such

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July 18.

The LORD CHANCELLOR.

Since I was last here, I have spent many hours in researches on this question. I have not yet arrived at the

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such depositions, nor give any other answer to the said questions; that the petitioners, the assignees, on the 28th of *May* last, filed interrogatories in this Court for the examination of the said *Thomas Brailsford*, pursuant to the said decree, some of which were to the same effect with the questions asked him before the commissioners, a copy of which interrogatories was carried to him the same day, and all his books which related to his examination, and an exact copy of his depositions which were given before the commissioners, was left with him the same time for his examination, and the said *Thomas* declared again that he had no further occasion for his books, for that he had fully perused them, and that he would send his examination to a gentleman of credit at the bar to sign, and that it should be forthwith put in; that notwithstanding several applications had been made to the bankrupt, and several summons taken out before a master to whom the cause stood referred, the said *Thomas Brailsford* had not put in his examination, nor were the petitioners as they could find, likely to have the same; the petitioners upon inquiry found that such examination of the said *Thomas Brailsford* is prevented by the said defendant *George*, and has reason to suspect that the said *George* or his agents were endeavouring to persuade the said *Thomas Brailsford*, on his said examination, to conceal the truth of the said transactions, and that in case the said *Thomas* should be discharged from his commitment, neither any examination at all, or at least an insufficienr one would be put in by the said *Thomas Brailsford*; that the said *Thomas Brailsford* was greatly under the influence of the said *George*, and the greatest part of the money received by the said *Thomas* of the petitioners was to pay bills of exchange, to the payment whereof the said *George*, and his partner at *Oporto*, would otherwise have been liable, and was received of the petitioners by bills drawn by the said *Thomas Brailsford* on the said *George*, and his partner at *Oporto*, and was, indeed, a contrivance of the said

the end of them, but I will now dispose of it, so far as to explain the real state of *Jenkes*'s case, which seems to me not to have been fully understood.

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It

said *George* to get his own bills paid with the petitioner's, money. That the petitioners have been at a great expence in bringing and prosecuting the said suit, and hoped they should succeed, and that a fair examination, (if the same could be had from the said bankrupt,) would contribute thereto, but could not expect the same so long as he was under the influence and direction of the said *George* and his solicitor, and his examination was to be drawn for them and for their interest; they, therefore, prayed that the said bankrupt might be brought up and examined *vivâ voce* on the said interrogatories, before the said master, and that the said bankrupt might not be discharged till he had put in a full examination to the said interrogatories; and in case he should refuse to put in any answer thereto, that the petitioners might make use of his said depositions instead of such his examination; or that I would make such other order as I should think fit: Whereupon I ordered all parties concerned, or their agents, to attend me on the matter of the said last-mentioned petition, the then next day of petition, at which time I had appointed the petition of the said bankrupt to be heard, whereof notice was forthwith to be given: Now this present 13th day of *October*, 1725, both the said petitions coming on to be heard together, upon hearing of Mr. Solicitor-General, Mr. *Lutwyche* and Mr. *Green*, of counsel for the said *Thomas Brailsford* the bankrupt, and of Mr. Attorney-General and Mr. *Talbot*, of counsel for the said *Robert Castell* and *John Rogers*, and also of Mr. *Dowse* one of the commissioners in the said commission, and who signed the said warrant of commitment, and what was alleged on both sides, I do order, that the commissioners in the said commission of bankrupt named, do discharge the said *Thomas Brailsford* from their said commitment to the prison of the Fleet, and by consent of the said counsel for the said *Thomas Brailsford*, I do further order, that at the charges of the said petitioners the assignees, he the said

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It is a circumstance material to be recollected, that Sir *Mathew Hale*, who adopts Lord *Coke*'s doctrine, (and in such

said *Thomas Brailsford* the bankrupt, do attend the Master to whom the afore-mentioned cause stands referred, and be examined *vivâ voce* to the interrogatories filed in pursuance of the decree in the said cause.

KING, *Chancellor*.

(*b*) *Lord Chancellor* KING. *September 7th*, 1728. *Re Thomas Mace*.

Bankrupt's petition presented same day, stating that on 26th *November*, 1726, commission had issued against petitioner, and petitioner's conformity; that on 3d *February*, 1727, petitioner was taken up on commissioners' warrant of that date, on suspicion of concealment of his effects, and for prevaricating in his examination, as the warrant did mention, and made a close prisoner in the *King's Bench*, and had so remained ever since, stating also his great distress, and that no prosecution or proceeding whatever had been had against him respecting such concealment; and praying that a short day may be appointed for the commissioners to take his examination in prison, in order to his discharge.

Lord Chancellor ordered, that the commissioners should forthwith appoint a time to meet and further examine the petitioner, and reasonable notice should be given to the assignees; and if upon such further examination, the commissioners should be satisfied that the petitioner had made a full discovery, then they were to discharge him out of custody, so as that he might not be detained therein upon account of the offences for which they committed him.

Lord Chancellor KING. *December*, 1728. *Re said Thomas Mace*.

Further petition of said *Thomas Mace*, stating the order on his former petition; that the petitioner had caused the said three acting commissioners to be served with the said order, and had applied to them for a meeting, which they did refuse to appoint, alleging their power was determined by the demise of his late majesty; petitioner's creditors

such a manner as to show that that part at least of his work cannot be justly characterised as a loose note (*a*), for he takes a distinction which *Coke* had not taken, and must be considered as having applied his great judicial mind to the subject,) Sir *Mathew Hale*, I say, retired from the office of Chief Justice, in 1675, and died in 1676. (*b*) The dates are important in this way; Lord *Nottingham* in *Jenkes*'s case, argues on the statute 16 *Car.* 1. that the Court of Chancery could not have power to grant the writ at common law, because no provision has been made as to this court in that statute; but it is clear that Lord *Hale*, who left his work transcribed for publication after his death, and there expressly states that the Chancery has the power of issuing a writ of *habeas corpus* in the vacation as well as in the term, must have known the statute of 16 *Car.* 1., and could have seen no objection arising from it against that doctrine.

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Blackstone, in his Commentaries (*c*) has given the history of the writ of *habeas corpus ad subjiciendum*, perhaps not altogether with his usual accuracy. His words are (*d*), " but the great and efficacious writ, in all manner of illegal confinement, is that of *habeas*

(*a*) *Wilmot*'s Opinions, p. 100.
(*b*) *Emlyn*'s Preface to *Hale*'s Pleas of the Crown.
(*c*) Vol. iii. p. 131. *et seq.*
(*d*) 3 Comm. 131.

ditors had not thought fit to renew the said commission, nor, as the petitioner did believe, ever would, and petitioner submitted he had been sufficiently punished by two years' imprisonment; and praying or relief and discharge out of custody. Upon reading said petition, and hearing counsel, and reading the affidavit of *Thomas Chatty*, as also said former order,

Lord Chancellor ordered that the petitioner be discharged out of said prison, so far as he is therein detained by virtue of said commissioners' warrant.

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corpus ad subjiciendum, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf." It is very material to the jurisdiction of this court, to recollect in how many cases it issues the writ, with reference to infants and to lunatics, concerning which scarcely any notice is taken in any of our books, except books of practice.

Blackstone then states this to be, "a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench, not only in term time, but also during the vacation, by a *fiat* from the Chief Justice or any other of the Judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." If the account of *Jenkes's* case published by persons who denominate themselves his friends is correct, it would appear that a previous application had been made to Chief Justice *Rainsford* for a writ of *habeas corpus*, in the vacation, and that he had refused it. (*a*) That representation is not confirmed by Lord *Nottingham's* statement.

Blackstone proceeds, "if the writ issues in vacation, it is usually returnable before the Judge himself who awarded it, and he proceeds by himself thereon unless the term should intervene, and then it may be returned in court." If this is applied to the practice of the King's Bench, subsequent to 31 *Car.* 2., it is accurate; that is, supposing the opinion of the Judges

(*a*) 6 *Howell's* State Trials, 1195, 1196.

delivered

delivered in 1758 (*a*) to be correct, that the justices of that court could issue the writ in the vacation.

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Blackstone continues, "indeed, if the party were privileged in the Courts of Common Pleas and Exchequer, as being (or supposed to be) an officer or suitor of the Court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence, and, if the cause of imprisonment were palpably illegal, they might have discharged him; but if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the Court of King's Bench, which occasioned the Common Pleas for some time to discountenance such applications:" that is, to discountenance such applications even in the case of privileged persons; "but since the mention of the King's Bench and Common Pleas, as co-ordinate in this jurisdiction, by statute 16 *Car.* 1. c. 10. it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common-law writ, in either of those courts, at his option." That doctrine is very remarkable; for the statute 16 *Car.* 1. gives no jurisdiction to the judges of the Common Pleas to issue a writ of *habeas corpus*, except in cases there mentioned; but then, by a construction in favor of the liberty of the subject, they have granted the writ in other cases; and have inferred from a statute giving to them power in certain specified instances, that they possess a general power to issue the writ, though applied for by persons not privileged; a very material observation as to the supposed operation of the statute 16 *Car.* 1. to work a negative on the proposition that this Court can issue the writ in vacation.

Construction in favor of the liberty of the subject.

Blackstone subjoins, "it has also been said, and by

(*a*) *Vide post*, p. 60. *et seq.*

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very respectable authorities, that the like *habeas corpus* may issue out of the Court of Chancery in vacation: but, upon the famous application to Lord *Nottingham* by *Jenkes*, notwithstanding the most diligent searches, no precedent could be found where the Chancellor had issued such a writ in vacation, and therefore his Lordship refused it." I observe on this passage, that in substance it is true, but that the refusal rested on reasons beyond the mere want of precedent.

Why, on that occasion, the search was confined to precedents of writs of *habeas corpus* issued in vacation, if there is foundation for so many doubts as have been expressed, whether the Lord Chancellor has power to issue the writ in term time, it is not easy to explain. If well directed towards the object of inquiry, the search would have been instituted to ascertain in what instances this Court had, as well as in what it had not, issued the writ, for the purpose of collecting the principle on which it was issued, and of discovering what was the defect of power in the particular case in which application for the writ was made.

Blackstone then states the ground on which the stat. 31 *Car.* 2. passed. "In the case of *Jenkes*, before alluded to, who in 1676 was committed by the King in council for a turbulent speech at *Guildhall*," (if we are to collect what the offence of *Jenkes* was from matter to be found in the warrant, (*a*) I doubt whether *Blackstone* has correctly put this in his text,) "new shifts and devises were made use of to prevent his enlargement by law; the Chief Justice (as well as the Chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c. whereby the prisoner was discharged at the *Old Bailey*." (*b*)

(*a*) 6 *Howell's* State Trials, 1193.　(*b*) 3 *Bl. Com.* 135.

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According to this you would suppose that there had been an application in the vacation, not only to the Lord Chancellor, but to the Chief Justice, for a writ of *habeas corpus ad subjiciendum*, that they had refused it, and that a writ *ad deliberandum* had been afterwards issued, and that he was then discharged.

The account in the State Trials, purporting to be published by *Jenkes's* friends, I suppose accurate as to the particulars which I shall mention. It states his speech, and the charge by the King in council, which according to this statement was founded on affidavits, the substance of which is also stated. Then follows a dialogue (*a*) adverting to the distinction now very well known, that the Common Hall is not a court, except for the purposes for which it is made a court by charter; a distinction which has introduced the custom of the King receiving addresses from the Common Hall in person on his throne, and the House of Lords receiving a petition from the same body only as the petition of the individuals who signed it. *Jenkes* is then committed by a warrant, the words of which are given.

The Common Hall is not a court, except for the purposes for which it is made a court by charter.

The statute of 16 *Car.* 1. c. 10. having been passed before this commitment, and having given to the Judges of the King's Bench and Common Pleas a right to issue the writ of *habeas corpus* in cases therein mentioned, (and I should think this case one of them, because the act is expressly made to apply to commitments by the King and others in person in his council,) in the then state of the law, a subject committed for what is here represented, (on which I shall make no comment, except that the commitment was of such a nature, that one should wish to find in the law a power to examine

(*a*) 6 *Howell's* State Trials, 1193.

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its propriety,) it being clear that under that act of *Car.* 1., the Courts of King's Bench and Common Pleas could not issue the writ in vacation, was altogether without remedy, unless the Chancellor, being applied to, could issue the writ in vacation, and make it returnable not *immediate*, supposing him to have issued it for the purpose not of giving immediate relief, but of securing to himself, if he knows the distinction of term, or to some other court, in term, the means of deciding whether the commitment was proper.

This case of *Jenkes* has been so often mentioned, that it becomes material to have a statement of it, which cannot be doubted. In what I consider an authentic copy of Lord *Nottingham*'s Manuscripts, I have found a full account, entered by himself, of all these proceedings. (*a*) Lord *Nottingham* has not given exactly the same account of what he said as this printed book (*b*), but in effect it amounts to the same. Speaking with all deference and respect to this great man, I cannot agree that the passage in the Year Book (*c*), is of no consequence; because the proposition that when the courts of common law are adjourned the Chancery is not adjourned, at least raises the question, Can the Chancery grant the writ in term time, and if then, why not in the vacation? If you are to say there is a reason why this Court can grant it in term time, and not in vacation, the doctrine that the Court is not adjourned in vacation is applicable to that distinction; and I therefore cannot accede to

(*a*) The Lord Chancellor here read the passage inserted, *ante* p. 12.

(*b*) The State Trials.

(*c*) 4 *Ed.* 4. "*Quant adjurnement de terme est, le Chauncerie ne sera pas adjorne, car ceo cour est touts foits overt.* 4 Ed. 4. 22." (23, 21.) "*car home poit aver proces hors de ceo court a ascun temps, et le Chancelor hors de terme poit oier causes la.*" Crompton on Courts, 41. b. 42. a. *ante*, p. 20.

 Lord

Lord *Nottingham's* description of this passage as too weak a foundation to build on.

Lord *Nottingham* then relates a proceeding, or rather circumstances of another proceeding before him (*a*), which circumstances are not noticed in the printed account. All the precedents mentioned are very ancient, and very remote from the day on which this happened. It appears from the printed case, that this gentleman and his friends intimated to Lord *Nottingham*, and no one can blame them for the intimation, that they were applying, not to know on what petition the king of his grace might have discharged the prisoner, but for the writ to which he was entitled in order to his discharge by right, not by favour; and Lord *Nottingham* seems to have been a good deal distressed by the application. How the authors of the statement in the State Trials got at what passed in the Privy Council I know not. The result of what occurred afterwards, as far as I am at liberty to state it is, that some of the Lords thought that the Lord Chancellor had no right to ask their opinion on such a subject, but ought to advise them; and it ends in a resolution that the opinion of the Judges should be taken on their return from the circuits. There follows a large collection of cases in which, in old time, the writ of mainprize had issued; with a very learned statement of Lord *Nottingham's* opinion, that the right to the writ had been abolished by a subsequent statute. (*b*)

I observe that in the State Trials this is described as a very singular case, because the Lord Chancellor refused to bail *Jenkes* in one instance for want of precedents, and in another against a multitude of precedents. Lord *Nottingham* explains that, by the observation that in

(*a*) See *ante*, p. 14. (*b*) 28 *Ed.* 3. *c.* 9. *Vide post*, p. 83. *et seq.*

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in the last instance, the right to the writ was taken away by an old statute, and that the statute (*a*) which had given the writ in criminal cases, did not authorise issuing it on commitments by the Privy Council. The account in the State Trials relates that Chief Justice *Rainsford* was applied to for a writ of *habeas corpus*, who refused it; but that afterwards, on his representation, *Jenkes* was discharged.

It is important, in cases of this kind, to know how they end. I have here an account which I cannot but take to be very authentic; and it seems that the circumstances under which this person was discharged are such, as can hardly be forgotten in weighing the authority of the case. Lord *Nottingham*'s statement is, that afterwards in *September*, Chief Justice *Rainsford* being returned from the circuit, and the sessions at the *Old Bailey* approaching, *Jenkes*'s friends moved him for a writ to remove the prisoner to the county prison, in order that he might be brought within the process of jail-delivery, in which case he must be delivered. The Chief Justice came to Lord *Nottingham*'s house where he was indisposed, to be advised; Lord *Nottingham* thought it of ill example, that, without precedent, commitments by the Council should, by these means, become subject to justices of jail-delivery; the Chief Justice told him there were precedents where writs of *habeas corpus* had been issued to the Lieutenant of the Tower, to remove a prisoner to *Newgate*; Lord *Nottingham* said that might be, where the King was desirous to expedite the trial. Afterwards, considering that all imprisonments before trial were *ad custodiam* and not *ad pœnam*, and that the man, though he used extraordinary means to deliver himself, had lain long enough, and that if he should come out by the jail-delivery (Lord *Nottingham*

(*a*) 3 *Ed.* 1. *c.* 15.

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therefore doubts whether he would not come out) it would be of ill-consequence; therefore, says Lord *Nottingham*, I advised the Chief Justice to counsel the King that it would be better to direct the Chief Justice to take security of the prisoner, to appear the first day of next term and answer an information. That advice was approved by the King, and followed. About this time, continues Lord *Nottingham*, Sir *Philip Moreton* applied to me for a writ of mainprise. I advised him to petition the King, and I would speak for him: he did so, and I obtained an order for his bailment.

The result is, that the course that was then taken was, to apply for a writ of *habeas corpus* to remove the prisoner from the gate-house, into the county where the jail-delivery would reach him; and without determining whether that writ could be had, he was discharged. In weighing the authority of *Jenkes*'s case, we should not at this day look to it with the impartial eyes which become a court, if we did not recollect the beginning, the course, and the conclusion of it. (*a*)

July, 20.

The LORD CHANCELLOR, having inquired, whether notice of the bankrupt's application for the writ had been given to the commissioners, and having received an answer in the negative, proceeded thus:

It appears on the old orders that notice was given to the commissioners, and I learn from some reports published a few days ago, that an action has been brought for this commitment, against the commissioners.(*b*) On looking at the affidavit to take this case out of the exception in the statute 31 *Car*. 2., which

(*a*) *Vide post*, p. 65. 83. *et seq*.

(*b*) 2 *Stark*. 261.

seems

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seems a little insufficient, it does appear that the bankrupt has been pressing to obtain his release, for the purpose of enhancing damages for the commitment.

I proceed to state what I find in the books on the competence or incompetence of this Court to grant the writ of *habeas corpus*.

Writ of *habeas corpus* a high prerogative writ.

The doctrine originates in the maxim of law, that the writ of *habeas corpus* is a very high prerogative writ, by which the King has a right to inquire the causes for which any of his subjects are deprived of their liberty (*a*): a liberty most especially regarded and protected by the common law of this country. The first mention of the doctrine which it is necessary now to cite, is to be found in Lord *Coke*'s reading on *Magna Charta*, in which he states his opinion that this Court has a right to issue the writ. His words are these, "The like writ" (of *habeas corpus*) "is to be granted out of the Court of Chancery, either in the time of the term, (as in the King's Bench,) or in the vacation; for the Court of Chancery is *officina justiciæ*, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time, as in the term." (*b*)

The liberty of the subject most especially regarded and protected by the common law.

In another part of the same reading, he says, "Now it may be demanded, if a man be taken, or committed to prison *contra legem terræ*, against the law of the land, what remedy hath the party grieved? To this it is answered, first, that every act of Parliament made against any injury, mischief, or grievance, doth either expressly or impliedly give a remedy to the party wronged, or grieved, as in many of the chapters of this great charter

(*a*) See *Hale*'s History of the Common Law, 193.

(*b*) 2 *Inst.* 53.

appeareth;

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appeareth; and, therefore, he may have an action grounded upon this great charter, &c. And it is provided and declared by the statute of 36 *Edw.* 3., that if any man feeleth himself grieved, contrary to any article in any statute, he shall have present remedy in Chancery, (that is, by original writ,) by force of the said articles and statutes. 2. He may cause him to be indicted upon this statute at the King's suit, &c. 3. He may have an *habeas corpus* out of the King's Bench or Chancery, though there be no privilege, &c. or in the Court of Common Pleas, or Exchequer, for any officer or privileged person there." (*a*)

There is a passage in his reading on a later statute, not so explicit, to the same purpose. "That *Curia Cancellariæ*, was *officina justitiæ*; for in those days," (he refers to the reign of *Edw.* 1.,) "not only original writs in *Regist' Cancellariæ*, but all commandments upon any occasion for the safety of the nation, or the good government thereof, were by writs, and passed under the great seal; and therefore necessary in those days, that the Chancellor, having the custody of the great seal, should be about the King at all times; and this is the cause that the Court of Chancery cannot be adjourned." (*b*)

Lord *Coke* again, in two or three passages of the Fourth Institute, notices this power of the Court of Chancery. "This Court," he says, "is the rather always open;" and then he subjoins the special reason why it is always open: "for, that if a man be wrongfully imprisoned in the vacation, the Lord Chancellor may grant a *habeas corpus*, and do him justice according to law, where neither the King's Bench nor Common

(*a*) 2 *Inst.* 55.

(*b*) 2 *Inst.* 552.

 Pleas

1818. Pleas can grant that writ but in the term time; but this Court may grant it either in term time or vacation." (*a*)

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It is quite clear here, that Lord *Coke*, when he wrote the fourth volume of his Institutes, still continued of opinion that the Court of King's Bench could grant the writ only in term time; an opinion which I think is not well founded, but which it is extremely difficult to deny would have been thought well founded, at the time when Lord *Coke* wrote: he appears of opinion also, that the Court of Commou Pleas can grant the writ only in term time; and when he wrote it would have been extremely difficult to maintain that the Common Pleas could grant the writ at any time, except in favour of a privileged person; though afterwards, in *Bushell's* case (*b*), the judges of that Court were of opinion that they could grant the writ in the case of persons not privileged.

In another passage of the same treatise, Lord *Coke* says, "So odious was unjust imprisonment, or unjust detaining of any freeman in prison, as in ancient time there lay a writ *De pace et imprisonamento*, &c. *ubi liber homo*, &c. *uno modo propter injustam captionem, et alio modo propter injustam detentionem*, &c. And there you may read the form of the writ of appeal, *de pace et imprisonamento*, which we have the rather remembered, that it may be observed what several remedies the law hath allowed for the relief and ease of the poor prisoner. But the readiest way of all is by *habeas corpus* in the term time, or in the vacation out of the Chancery, as you may read at large in the second part of the Institutes, *Mag. Carta*, cap. 29., and *Statut. de Gloc.* cap. 9., and the exposition upon the same." (*c*)

(*a*) 4 *Inst.* 81.
(*b*) Vide *post*, p. 54.
(*c*) 4 *Inst.* 182

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In the chapter on the Courts of the Forest, is a passage which seems not to have been cited in many discussions on the subject: — "Out of this case we do observe six conclusions. 1st, That the law of the forest is allowed and bounded by the common laws of this realm, and therefore it is necessary, that the judges should know, and be learned in the same. 2d. That though the verderors be judges of the Swanimote, and the steward but a minister, yet the presentment in that court is as well by them as verderors, as by foresters, or keepers, regarders, and agisters, by the law of the forest. 3d. That a forester or keeper may arrest any man that kills or chaseth any deer within the forest when he is taken with the manner within the forest, or if the offender be indicted. But then it is demanded, what if a man be so imprisoned, and after offer sufficient pledges, and they are not taken, what remedy for the party, seeing there are very seldom justice seats for forests holden? The answer is, that in the term time he may have *ex merito justitiæ*, a *habeas corpus* out of the King's Bench, or if he have privilege, out of the Court of Common Pleas, or of the Exchequer, or out of the Chancery, without any privilege, either in the term time, or out of the term in time of vacation; and upon the return of the writ, he may be bailed to appear at the next eire to be holden for the forest." (*a*)

Such being the doctrine of Lord *Coke*, it becomes necessary to take notice next of the statute 16 *Car*. 1. *c*. 10., "For the regulating of the Privy Council, and for taking away the Court commonly called the Star-Chamber," which contains this enactment relative to the writ of *habeas corpus*; "That if any person shall hereafter be committed, restrained of his liberty, or suffer

(*a*) 4 *Inst*. 290.

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imprisonment, by the order or decree of any such Court of Star-Chamber, or other court aforesaid, now or at any time hereafter, having, or pretending to have, the same or like jurisdiction, power, or authority, to commit or imprison as aforesaid, or by the command or warrant of the King's Majesty, his heirs or successors, in their own person, or by the command or warrant of the Council Board, or of any of the Lords or others of his Majesty's Privy Council, that in every case every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion by his counsel, or other employed by him for that purpose, unto the judges of the Court of King's Bench or Common Pleas, in open Court," (that is, to the Court, and not to the judges individually,) "shall, without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of *habeas corpus* to be directed generally unto all and every sheriffs, gaoler, minister, officer, or other persons in whose custody the party committed or restrained shall be, and the sheriffs, goaler, minister, officer, or other person in whose custody the party so committed or restrained shall be, shall, at the return of said writ, and according to the command thereof, upon due and convenient notice thereof given unto him, at the charge of the party who requireth or procureth such writ, and upon security by his own bond given, to pay the charge of carrying back the prisoner, if he shall be remanded by the court to which he shall be brought, as in like cases hath been used, such charges of bringing up and carrying back the prisoner to be always ordered by the court, if any difference shall arise thereabout, bring, or cause to be brought, the body of the said party so committed or restrained unto and before the judges or justices of the said Court from whence the said writ shall issue, in open Court, and shall then likewise certify the

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true caûse of such his detainer or imprisonment, and thereupon the Court, within three court-days after such return made and delivered in open Court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner; and if any thing shall be otherwise wilfully done, or omitted to be done by any judge, justice, officer, or other person aforementioned, contrary to the direction and true meaning hereof, that then such person so offending, shall forfeit to the party grieved his treble damages, to be recovered by such means, and in such manner as is formerly in this act limited and appointed for the like penalty to be sued for and recovered." (a)

The following section enumerates the different courts to which the act is to extend.

If the power of the King's Bench or Common Pleas were to be collected from this act, it must be observed, that the act gives to these Courts respectively the power of interposing in the cases which are distinctly here pointed out, but does not give to them as Courts any power of interposing in other cases, nor to the individual Judges a power of interposing in any case. The statute, therefore, has not enabled us to say what was the power of the Court of King's Bench out of term, or in other words, what was the power of the individual Judges of that Court out of term, or what was the power of the Court of Common Pleas in term, or of the individual judges of that Court out of term, relative to the writ of *habeas corpus*, in cases not within the act; and it makes no mention of the Court of Chancery.

(a) S. 8.

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There is a great deal of authority, indeed, that the Judges of the King's Bench could issue the writ of *habeas corpus* in criminal cases in term time, great doubt whether the individual Judges of that Court could issue the writ out of term, and great doubt whether the Court of Common Pleas could in term time issue it in criminal cases, or in any case except that of a privileged person, or a person whom by fiction they consider privileged, or whether the individual Judges of that Court could issue it in vacation. In *Bushell's* case (*a*), however, it was held that the Court of Common Pleas could grant the writ in favour of a person not privileged. Chief Justice *Vaughan's* individual opinion seems to have been that the writ could not be issued (*b*); but was over-ruled by the opinions of his three brethren. That case is in many respects very material to the question now before the Court.

Bushell was committed in the 22d year of *Charles* 2., for a verdict given by him as a juryman contrary to evidence and the direction of the Judge in matter of law. I mention the cause of commitment, thinking that the case affords some doctrine applicable to the present warrant. The first point agitated and resolved in the affirmative was, that the return was insufficient, even if there had been a proper cause of commitment. A return of commitment because the jury had acquitted the prisoner against full and manifest evidence is bad; for although the truth of the fact might be so, the court before which the return was made, ought to have the same means of judging whether the verdict was against full and manifest evidence, as the court by which the party was committed; and it clearly would not have

(*a*) *Vaugh.* 135. *T. Jones*, 13. *Freeman*, 1. 3 *Keble*, 322. 1 *Mod.* 119. 184. 6 *Howell's* State Trials, 999.

(*b*) See *T. Jones*, 13, 14., and *Anon. Carter*, 221.

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the same means of forming that judgment, unless it had the evidence on which the verdict was returned. (*a*)

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The case also involved the question, whether the Court of Common Pleas could issue the writ, except in the instance of privileged persons? Three of the Judges held the affirmative: Chief Justice *Vaughan*, it seems, had thought otherwise, but concurred in discharging the prisoner. The judgment supports the right of issuing the writ on broad principles; namely, that the King's court could not, *salvo juramento suo*, have before it the King's subject unlawfully committed, without releasing him from that unlawful imprisonment.

On this decision my first remark is, that the authorities which deny to the Court of Chancery the power of issuing the writ, deny it expressly in term as well as in vacation, and certainly on reasoning which applies to term; but in *Bushell*'s case the principle of the conclusion that the Common Pleas can issue the writ in general cases is, that the King's Bench cannot have an exclusive right to issue it, because, without question, it may be issued by the Court of Chancery. Thus the Judges, on the foundation of text-law to be found in the books, assert the right of the Court of Chancery to issue the writ of *habeas corpus*, and then argue from that fact, that the King's Bench cannot have an exclusive right.

Bushell's case, therefore, is applicable in two very material points to the question now before us.

Lord *Hale* in the passage cited from his History of

(*a*) " The cause of the imprisonment ought, by the return, to appear as specifically and certainly to the Judges of the return, as it did appear to the court or person authorized to commit, else the return is insufficient." *Vaugh.* 137.

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the Pleas of the Crown, states the right of the Court of Chancery to issue the writ of *habeas corpus;* and instead of stating it in a way which implies doubt in his mind, I think the manner of his statement rather shows that he entertained no doubt. His opinion is very material, regard being had to the time in which he lived, and the different offices which he filled. He was appointed Judge in 1653, became Chief Baron in 1660, Chief Justice of the King's Bench in 1671, resigned that office in *February*, 1675—1676, and died in *December*, 1676. (*b*) In weighing the opinion of Lord *Hale*, it becomes us to recollect his eminence as a lawyer, and the stations he adorned, and that he lived at a period in which he must have been very conversant with the notions of the different courts of *Westminster* Hall on this writ; at a period when he must have known what was the construction to be put on the statute of *Car.* 1., and what were the defects of the law before the statute passed in the reign of *Car.* 2. Thus familiar with the doctrine of the Courts of *Westminster* Hall, thus qualified to form a judgment on the question, he delivers his opinion.

After stating the law relative to writs of *habeas corpus* of different kinds, he says, that the Courts of King's Bench and Chancery have an original power to grant an *habeas corpus*, and to bail, or discharge, or remand, as the case requires; and having stated certain distinctions in the exercise of the power of those Courts respectively, he applies himself to the writ of *habeas corpus ad subjiciendum*, " which is for matters only of crime, and is not regularly to issue nor be returnable but in term time, when the Court may judge of the return, or

(*b*) *Emlyn*'s Preface to *Hale*'s Pleas of the Crown, p. 1. n.

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bail, or discharge the prisoner (*a*);" and subjoins these words: "By virtue of the statute of *Magna Charta*, and by the very common law, an *habeas corpus* in criminal causes may issue out of the Chancery (*b*);" referring to a passage in the second Institute. (*c*)

I take this opportunity of observing, that a great deal of the difficulty objected to the power of this Court to issue the writ of *habeas corpus* in vacation in *Jenkes*'s case, consists in the difficulty of issuing an *alias* or *pluries* writ in vacation. It is true there may be a difficulty, and the rather because, as I now understand, the return is never filed in the Petty Bag Office, but the writ remains with the person who brings up the prisoner, as an authority for his discharge (*d*); but let it be recollected, that though the issuing the *alias* and *pluries* writ is the regular course for enforcing obedience, yet there is another way stated in the opinions of the Judges given on the occasion, to which I shall hereafter allude, namely, that the disobedience may be visited as a contempt of the Court; and I see no reason why, if courts of law can treat those who disobey the writ as guilty of contempt, this Court, cannot in the same way, enforce obedience to its order by the usual process of contempt.

Lord *Hale* proceeds thus: "It seems, regularly, this" (the writ of *habeas corpus*) "should issue out of this Court" (the Court of Chancery) "in the vacation time, but out of the King's Bench in the term time, as in case of a *supersedeas* upon a prohibition. 38 *Ed.* 3. 14. a.

(*a*) 2 *Hale P.C.* 145.

(*b*) 2 *Hale, P. C.* 147.

(*c*) 2 *Inst.* 55.

(*d*) With reference to a similar practice in the Court of King's Bench Lord Chief Justice *Holt* said, "Let it be a rule for the future, that when one is brought up by *habeas corpus*, the return remain in Court, and a copy of it only be given to the marshal." 6 *Mod.* 130

B. *Super-*

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B. *Supersedeas*, 13. When the cause is returned, the Chancellor may judge of the sufficiency or insufficiency thereof, and may discharge or bail the prisoner to appear in the King's Bench, or may *propriis manibus* deliver the record into the King's Bench, together with the body, and thereupon the Court of King's Bench may proceed to bail, discharge, or commit the prisoner. But if the Chancellor shall not discharge him, but bail him, this surety must be to appear in the King's Bench; or if the Chancellor shall do neither, it seems he may commit him to the *Fleet* till the term, and then he may be turned over to the King's Bench, and there proceeded against, for the Chancellor hath no power to proceed in criminal causes." (*a*) That is, if the commitment on the face of it, is good, but is for a bailable offence, as the Lord *Chancellor* cannot try criminal matter, he must put the prisoner in such a situation, that he will be amenable to a court which can try criminal matter; but if the return appears bad, the Lord *Chuncellor* ought not to proceed as if the return were good, but should at once discharge the prisoner.

This passage seems to warrant this observation; that when Lord *Hale* states that the writ of *habeas corpus* may issue out of *Chancery*, by virtue of *Magna Charta*, he adopts the reasoning of Lord *Coke*, that where a statute ordains, as that statute has ordained, that no man shall be imprisoned, but by the judgment of his peers, or the law of the land (*b*), it is a principle of our constitution, that our courts of law, must find a remedy, and provide means to make the law effectual; and upon that general principle, if it was the prevailing opinion, as I shall state presently, that the Court of King's Bench had power to issue the writ only in cri-

(*a*) 2 *Hale*, *P. C.* 147.

(*b*) *Magna Charta*, c. 29.

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minal cases, and the Court of Common Pleas only in the case of privileged persons, and only in term, the power of giving effect to the law, must have been inherent in this Court, which as *officina justitiæ* was always open. Lord *Coke*'s statement that the Court of Chancery is always open, must, I think, be understood as referring to the *Latin* side of the Court; he took great pains to prove that the Court of Equity is a very junior court, and his expression must have been intended to apply to the ancient jurisdiction.

Lord *Hale* has pointed out the distinction, that regularly the writ should issue out of Chancery in vacation only; a distinction which renders it impossible to suppose that he entertained a doubt that this Court in vacation can issue the writ. The subsequent passage proves that he was not merely copying from Lord *Coke*; for he goes on from his own authority, and without citing any book, to state what is the proceeding in Chancery, when a party being brought up by *habeas corpus*, on a commitment for criminal matter, which this court cannot try, appears to be bailable, and enters into all the particulars of the manner in which the Lord Chancellor is to deal with a prisoner in custody under a good warrant, but charged with a bailable offence. Can I then doubt that Lord *Hale* thought it lawful for the Lord Chancellor so to bring the prisoner before him?

It is said, that if the Court of Chancery possessed power to issue the writ, some notice would have been taken of it in the statute 16 *Car*. 1. c. 10. which in certain cases confers that power on the King's Bench, and Common Pleas, sitting only in term. But considering the period in which Lord *Hale* flourished, approaching

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so nearly to the time of *Charles* 1., and his having passed through the offices of Justice of the Common Pleas, Chief Baron, and Lord Chief Justice of the King's Bench, his opinion on the construction of that statute possesses the highest authority; and if he thought the doctrine that this court can issue the writ in vacation, inconsistent with it, can it be believed that he would have laid down that doctrine in terms thus express and unqualified?

In the year 1758, I think, on some proceedings in parliament for giving a prompt remedy to subjects restrained of their liberty, it became necessary to put various questions to the Judges. We have in Sir *John Wilmot's* Notes, on account of his answers. I have seen the answers of the other Judges; and there was a great difference of opinion on several questions then put. (*a*) With

(*a*) In 1758, a bill passed the House of Commons for extending the provisions of 31 *Car.* 2. c. 2. in cases of commitment or detainer for criminal or supposed criminal matter, to all cases of imprisonment or restraint of liberty under any pretence whatever. A copy of the bill may be found in the New Parliamentary History, vol. xv. p. 871—874. and Sir *John Wilmot*'s Notes, p. 77—79. n. *Dodson*'s Life of Sir *Michael Foster*, p. 49—72., contains a very instructive view of the abuses of authority, which excited the interference of the Commons, and eventually occasioned an important amendment of the law; with doctrines highly honorable to the sagacity and integrity of that distinguished judge. On the second reading of the bill in the House of Lords, ten questions were put to the judges. The questions, and the substance of their answers, are contained in the Lords' Journals, vol. xxix. p. 331. 337—341. 344—347. and the remarkable protest of Lord *Temple* in p. 352. 353. and have been copied into the New Parliamentary History, vol. xv. p. 907—923. The valuable answers of Sir *John Wilmot* are preserved at large in his Notes, p. 77—129. The House of Lords rejected the bill, and ordered "that the Judges do prepare a bill, to extend the power of granting writs of *habeas corpus ad subjiciendum*, in vacation time, in cases not within the statute

With respect to the present application some passages of Sir *John Wilmot*'s opinion are material.

On the first question, "Whether in cases not within the act 31 *Car.* 2. writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?" (*a*) the Judges were unanimous. They agree that it is a very high prerogative of the crown to issue the writ of *habeas corpus ad subjiciendum*, because absolutely necessary to the liberty of the subject. "It is a remedial mandatory writ, by which the King's supreme court of justice, and the Judges of that court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendant authority, that no privilege of person or place can stand against it." (*b*) They distinguish writs, as either writs of course, or writs not to be issued except on proper cause shown, and then assign reasons why the writ of *habeas corpus* is not to be issued except on cause shown; as, if persons were confined on board of ship, and a writ of *habeas corpus ad subjiciendum* were to be granted without an affidavit showing that it was proper, the most

statute 31 *Car.* 2. c. 2. to all the Judges of His Majesty's Courts at *Westminster*, and to provide for the issuing of process in vacation time, to compel obedience to such writs; that in preparing such bill, the Judges do take into consideration, whether, in any and what cases, it may be proper to make provision, that the truth of the facts contained in the return to a writ of *habeas corpus* may be controverted by affidavits or traverse, and, so far as it shall appear to be proper, that clauses be inserted for that purpose; and that the Judges do lay such bill before this House in the beginning of the next session of Parliament." Lords' Journals, xxix. p. 353. A copy of the draft prepared by the Judges, which seems the original of Serjeant *Onslow*'s act, 56 *Geo.* 3. c. 100. may be found in *Dodson*'s Life of Sir *Michael Foster*, p. 68—72.

(*a*) *Wilmot's Opinions*, p. 81.

(*b*) *Id.* 88.

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most serious mischiefs might ensue; supposing, for example, that they were confined on board of ship subject to quarantine. (*a*)

On the second question, " Whether, in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation by *fiat* from a Judge of the Court of King's Bench, returnable before himself?" (*b*) great difference of opinion appears in the reasoning of the Judges, but they agree in the conclusion, that a Judge of the King's Bench might then issue writs of *habeas corpus* in vacation by *fiat*; and they rest that right certainly on great principles, but on very little practice; for they cannot trace the practice beyond the Restoration, except in one or two cases. But how does Chief Justice *Wilmot*, as a great lawyer, conclude on this subject? He says that the practice since the Restoration he shall receive as evidence of preceding practice; but, he adds, if the commencement of the usage can be shown, that argument is not applicable, and the legality of the usage must be supported not by presumption, but by some other principle, and he refers to the principle, that where the reason is the same, the law is the same; and he would not hear it said, that if the Court of King's Bench had power to grant the writ in term time, the subject shall, during the vacation, be deprived of his right to the writ; and he could have it only if the Judges possess authority to issue it. The Chief Justice argues also from the powers of justices of the peace; and it is to be recollected that the Judges of the King's Bench are all justices of the peace, though I believe not the Judges of the other

(*a*) *Wilmot's Opinions*, 92. See *Hobhouse's* case. 3 *Barn. & Ald.* 420.

(*b*) *Wilmot's Opinions*, 94.

Courts

Courts. (*a*) He does not seem aware of all the passages in Lord *Coke*'s Institutes relative to the question, nor of *Jenkes*'s case. (*b*)

I understand him to say, that previously to the statute 31 *Car.* 2. *c.* 2., there was not more of authority for the right of the Chancery to issue the writ in vacation, (if that which is to be found in our best writers may be called authority,) than there was for the right of the Judges of the King's Bench; not so much authority. He says, "No writ of *habeas corpus* can be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords. The 16 *Car.* 1. takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation. And the 31 *Car.* 2. seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th section expressly empowers the Court of Chancery to grant it, which would have been unnecessary, if it could have granted the writ before: and it only shows, what I really take to be the truth of the case, that there was no settled fixed practice then established, of their issuing in vacation; but if they could not, nor ever did issue out of the Court of Chancery, it is the strongest reason that can be urged in support of the practice of issuing these writs by the Judges of the Court of King's Bench, in vacation, before the statute, because there could not otherwise

(*a*) 1 *Bl. Comm.* 350. *Lambard, Eirenarcha*, p. 12. *Bro. Abr.* Peace, pl. 12.; but in *Jones*'s case, 28 & 29 *Car.* 2., Sir *Francis North*, Chief Justice of the Common Pleas, said, that when he was not on the Bench he would take sureties as a justice of peace. 2 *Mod.* 199., and see *Bacon*'s Use of the Law, Works, vol. iv. p. 88.

(*a*) *Wilmot's Opinions*, 94. *et seq.*

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have been a perfect and complete remedy at all times for the subject against imprisonment, for a bailable offence at the common law, and before the statute of 31 *Car.* 2." (*a*)

The paucity of precedents in Chancery may be accounted for as easily as the paucity of precedents in the Common Pleas, and on the same principles. On the argument, that without a power in the judges of the Court of King's Bench to issue the writ in vacation, the subject would be left without remedy, I say, on the other hand, it seems that, previous to the Restoration, the instances are very rare indeed, of writs of *habeas corpus* issued by the judges of the King's Bench out of Court and in vacation; it is quite clear, that till *Bushell's* case, the Judges of the Common Pleas had no belief that the Court possessed a power to issue the writ, even in term time, in criminal cases, or that it was possible for them, as individual Judges of the Court, to issue the writ in vacation, before that power was given to them by statute 31 *Car.* 2.; then I find the texts that have been cited from Lord *Coke*; I find that, in the period in which Lord *Hale* lived, as justice of the Common Pleas, as Chief Baron, and as Chief Justice of the King's Bench, he acknowledged the infirmity of those Courts, and that even the Judges of the Court of which he was Chief Justice, had no power to grant the writ except in term; and I ask, with Chief Justice *Wilmot*, if *Magna Charta* secured to the subject his liberty, and if it be a principle of our constitution, that the Courts shall give effect to the law, and that speedily, and if I find not only authorities that the Court of Chancery has power to issue the writ, but principles on which those authorities are founded, and distinctions taken which re-affirm the proposition, and

Principle of the English constitution that the Courts shall give speedy effect to the law.

(*a*) *Wilmot's Opinions*, 101.

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not only doctrines laid down, but methods of proceeding pointed out, by such men who held such offices as Lord *Hale*, I ask, what was to become of the liberty of the subject between *Magna Charta* and 31 *Car.* 2., if the Judges of *Westminster* Hall held that those Courts had the power of issuing the writ only in term, and if they were wrong in holding that the Chancery had at all times a power of issuing the writ? What must have been the state of the subject? And how can I reconcile that state with those admitted legal principles?

We now come to *Jenkes*'s case, certainly a positive decision that the Lord Chancellor could not grant the writ at common law in vacation; and Lord *Nottingham* says, that he conferred with the Judges: but it does not appear that on that occasion all the authorities in the books had been consulted, and every consideration given to the subject; and it is not going too far to say, that a case which is capable of being rendered so doubtful as that is rendered, when we look at all the proceedings in it, I cannot think one which ought to bind me, against the stream of authority.

The decision of Lord *Nottingham* in *Jenkes*'s case over-ruled.

The only other authorities requiring observation are *Wilkes*' case (*a*) in 1763, and *Wood's* case (*b*) in 1770. It seems, that even at this late period considerable doubt existed whether the Court of Common Pleas, though it had acquired power in certain cases by the statute 16 *Car.* 1., could issue the writ in criminal cases. I think the judges of that Court decided properly that they could issue it. In *Wood's* case, Chief Justice *de Grey* says, that he sees the objection to the jurisdiction of that Court "had arisen from what is dropped, in 2 *Inst.* 55. 4 *Inst.* 290. *Dyer*, 175. 2 *Hal. P.C.* 144.

(*a*) 2 *Wils.* 151. (*b*) 2 *Blackst.* 745. 3 *Wils.* 172.

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that the Court of Common Pleas may grant *habeas corpus* if the person be privileged there, or in order to charge him with an action." (*a*) The Court of Common Pleas having no jurisdiction except in civil cases, although, as it was held in *Bushell's* case, and in the case to which I now refer, they could issue writs of *habeas corpus*, yet they discouraged applications to that Court; and for this reason, that the party who was to have the benefit of the writ was placed in a situation as distressing as if application had been made to the Court of Chancery; provided, I mean, that the warrant appeared good, but stated a bailable offence; for the Court of Common Pleas could not try him, and therefore there was a convenience in applications to the King's Bench, which did not exist in applications to Chancery, or to the Common Pleas; and although it is true that no such inconvenience would occur where on the warrant of commitment, it appeared that the prisoner ought to be discharged, yet there had grown a habit of practice out of those cases where the warrant stated a bailable offence, of applying to the King's Bench, which extended to almost every case.

Chief Justice *de Grey* then refers to *Bushell's* case, in which it is laid down as a great principle, that if a subject of the King is brought from prison before one of the King's superior courts, and it appears that the imprisonment is unlawful, the Court cannot, *salvo juramento suo*, remand him to that unjust imprisonment; in other words, cannot refuse to discharge him.

Blackstone, in his judgment, has given something of a satisfactory account of the course in which the Court of Common Pleas acquired the general power of issuing

(*a*) 2 *Blackst.* 745.

the

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the writ. "He thought that originally the writ of *habeas corpus* at common law could only be issued out of the Court of Common Pleas, when the party was privileged, or to charge him with a suit. But afterwards, *in favorem libertatis*, a mere suggestion of privilege was allowed to be sufficient to grant the writ; and a *capias* was afterwards sued out of conformity, to affirm the jurisdiction. This is the meaning of 2 *Hal. P. C.* 144. "If a person is sued in the Court of Common Pleas, or is supposed to be so sued, a *habeas corpus* lies in the Common Pleas." But when the statute 16 *Car.* 1., had put both courts upon the same footing, with regard to the writs of *habeas corpus* therein mentioned, this nicety began to be disregarded, and the cases cited by Lord Chief Justice in *Charles* the Second's time, have now established the general jurisdiction beyond a doubt." (*a*) See in what manner, according to this statement, the Judges argued in order to support their power of granting the writ of *habeas corpus*, and how they dealt with the subject in granting it, first at common law, and then after the statute 16 *Car.* 1. Originally, for the purpose of enabling them to give effect to the right which the subject had to his liberty, where by the circumstances of the commitment he had that right, they admitted the fiction or suggestion of privilege, in order to obtain jurisdiction; and they drop that fiction or suggestion after the 16 *Car.* 1. Now that statute gave them no jurisdiction except in the instances there specified; but from what they are to do in those instances, they have inferred, upon the words which I am about to mention, that it was no longer necessary for them in any case to retain this suggestion of privilege. A remarkable example of the strength of the principle which our law has in it, that, with respect to the liberty of the subject, the courts

Duty of the Courts to se-

(*a*) 2 *Blackst.* 746.

are

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cure the liberty of the subject.

are to struggle to secure it; for that statute says, that in the particular cases there mentioned, the subject for obtaining his liberty, shall without delay have a writ of *habeas corpus*, "for the ordinary fees usually paid for the same." (a) On this clause the Judges of that Court have argued, that there must have been usual fees payable in the Common Pleas on the issue of the writ of *habeas corpus*, and therefore though the statute has not conferred on them general powers which they had not before, yet because it has directed them to exercise the power in these particular cases, and in these terms, they conclude that it was the opinion of the legislature that they had the power in all other cases. They have therefore, according to *Blackstone*, discontinued the suggestion of privilege, and have said, When the subject comes before us unjustly imprisoned, we cannot refuse to him his liberty.

No inference from a statute designed in favor of the liberty of the subject, to the prejudice of that liberty

It is then contended that the statute 31 *Car.* 2. contains an implied negative of the general power of the Court of Chancery to issue the writ, because it expressly confers that power in particular cases. Be it so: but if the power existed before that statute, a power vesting a very high prerogative in the King, I say that it could not be taken away in any case by inference, from an enactment which enforced it in some cases. I go farther; if the prerogative of the King cannot be affected by general words in a statute, will a British court of justice permit it to be said, that a statute designed to enforce in particular instances the prerogative in favor of the liberty of the subject shall deprive the subject of that liberty in any case? That is a sufficient answer; but I have always understood that the statute 31 *Car.* 2. in all its enactments, is to be construed with reference to applications for a writ *under that statute*.

The stat. 31 *Car.* 2. is in all its enactments to be construed with reference to applications under it.

(a) 16 *Car.* 1. *c.* 10. *s.* 8.

The

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The statute 31 *Car.* 2. c. 2. recites that "great delays have been used by sheriffs, gaolers, and other officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus* to them directed, by standing out an *alias* and *pluries habeas corpus*, and sometime more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been, and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation:" (*a*) then, if application is made under that statute, inasmuch as it was intended to give additional remedies beyond what the subject had at common law, or under the previous statute, the third section directs, that the writ shall be marked, and proceeds to enact, that "if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation time, and out of term," they shall be entitled to a writ of *habeas corpus* to be issued by the Lord *Chancellor* or Lord Keeper, or any one of the Judges of either bench, or the Barons of the Exchequer; and provides the mode of proceeding. Mr. *Cullen* seems to think that this clause has relation only to persons committed in vacation; but the words are, if any person shall be or *stand* committed in vacation; that is, as I understand, if he shall be committed in vacation, or being committed in term shall stand committed in vacation. The Judges who argued, on the questions proposed in 1758, against the power of the Court of Chancery to issue the writ in vacation, by reason of the enactments of this statute, held that the Judges of the

31 *Car.* 2. c. 2. s. 3. extends to persons committed during term.

(*a*) S. 1.

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King's Bench had power to issue the writ in vacation, and thought that they derived that power from this statute; and yet the reasoning is just as strong to one court as to the other.

The fourth section denies the benefit of the statute to persons wilfully neglecting to apply for a writ during two terms; but will any one say that if a man has been injustly deprived of his liberty during two terms, without being aware that the restraint was unlawful, he cannot have the writ at common law? That can never be maintained.

Then follows a clause very carefully worded, providing that it shall be lawful "for any prisoner and prisoners as aforesaid, to move and obtain his or their *habeas corpus*, as well out of the high Court of Chancery or Court of Exchequer, as out of the King's Bench or Common Pleas, or either of them;" (words from which it has been inferred that the writ could not be previously obtained from the Courts of Chancery or Exchequer,) "and if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the time being of the degree of the coif, of any of the courts aforesaid, in the vacation time," (not in term but in vacation), "upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made, that such copy or copies were denied as aforesaid, shall deny any writ of *habeas corpus*, by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid." (*a*)

With respect to the Court of Exchequer, this is a

(*a*) S. 10.

very

very singular clause. It gives to that Court power to grant the writ in term; it cannot as a court grant the writ in vacation, for the court sits only in term (*a*), while the Chancellor sits both in term and in vacation; but the penalty applies to the vacation only. 1818. CROWLEY'S Case.

If this clause is to be reasoned on to its general effect; that is, if it is to be said, that because there is a clause empowering the Court of Chancery to issue the writ, that Court had not power to issue it before, that conclusion strikes at the power of the Court not in vacation only, but in term; at all times. The question is, whether this statute is to be construed with reference to applications under the statute; applications with a view to subject those to whom they are made to the penalties which it inflicts in the event of disobedience? or whether, in consequence of these particular enactments, all that we find in the books in support of the Chancellor's authority is to stand for nothing? Whether, recollecting that we have found very few precedents of applications to individual Judges of the King's Bench, previous to the Restoration, we are to hold that this Court, before 31 *Car.* 2. and before 16 *Car.* 1., had no power to enforce the provision of *Magna Charta*, but

(*a*) "The principal times of session at the Exchequer were the two terms of *Easter* and St. *Michael*. At which times the process that issued *pro rege* was returnable, and many acts became necessary to be done there in consequence thereof. The Exchequer was also holden during the other two law terms, to wit of St. *Hilary* and of the *Trinity*. But it seemeth, that the Treasurer and Barons sometimes sat if there was occasion, at other times not comprised within the limits of the four terms above mentioned; and sometimes on Sundays." *Madox*, History of the Exchequer, ch. xx. p. 550. See some remarks on this passage in *Wooddeson's* Lect. i. 120. n. Dr. *Wooddeson* adds, "The Exchequer holds sittings for equity business, out of term; at which also a matter relating to the revenue may be discussed." Ibid.

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when the party was brought before it, and the Court saw that he was in unjust durance, it was compelled to leave him there; the subject, during a considerable period of our history, being without remedy?

Before the statute *5 Geo. 2. c. 30.* I see that orders for the discharge of prisoners committed by the commissioners of bankrupt, were in the form of recommendations to the commissioners to discharge them. It had occurred to me that this Court had no authority to discharge by petition, and that the right way was by writ of *habeas corpus.* I believe, but I am not certain, that in some instances in which I have discharged bankrupts by *habeas corpus,* the application was made within two terms after the commitment, but the writ was not marked according to the statute; and I must admit, therefore, that I was wrong, if the Court has not power to issue the writ in vacation, at common law.

Another difficulty has been much pressed, namely, how we are to proceed under the writ, between the equity and the Latin sides of the Court? Lord *Nottingham* has said, supposing the writ disobeyed, the Chancellor can grant no attachment till term time; and that he ought to grant the attachment as he would grant the writ of prohibition, returnable in the King's Bench. I answer, with Chief Justice *Wilmot,* in all the books we find that the proceeding under the writ of *habeas corpus,* if disobeyed, is by *alias* and *pluries* in term time; but notwithstanding that, when on the occasion to which I have repeatedly referred, a question was put to the Judges, "Whether, in case a writ of *habeas corpus ad subjiciendum,* at the common law, be directed to any person returnable *immediatè,* such person may not stand out an *alias* and *pluries habeas corpus,* before due obedience thereto can be regularly enforced by the course of the common law?" (*a*)

(*a*) *Wilmot's Opinions,* p. 104.

Chief

Chief Justice *Wilmot* answers, "I am of opinion, that in case a writ of *habeas corpus ad subjiciendum*, at the common law, be directed to any person returnable "*immediatè*," the Court, upon the affidavit of the service of the writ, will grant a rule for an attachment. By the course of the common law, he might have stood out an *alias* and *pluries*; but by practice the course is now altered, and in many cases the Court has enforced obedience to a writ for private restraints, in the first instance, by attachment, for the furtherance of justice. The method of proceeding by *alias* and *pluries* is gone into disuse, in almost all cases, and the process by attachment substituted in its stead: and that practice stands upon this legal principle; that disobeying the King's writ is a contempt, and equally a contempt to disobey the first writ as the last." (*a*)

If I do not misunderstand the principle, I say, that if the Courts of King's Bench and Common Pleas can issue the writ of attachment, in the manner in which they can issue it for disobedience to a writ of *habeas corpus* returnable *immediatè* (*b*), this Court can issue process of contempt for that purpose, and can apply its process in the same mode in which it is applied in other cases.

Obedience to the writ of *habeas corpus* may be enforced by process of contempt.

On the whole, therefore, it seems to me, that it is the duty of this Court to grant the writ if applied for: there may be great inconvenience; but I say with Lord *Hale*, that if the subject chooses to apply here, as I understand the law, I cannot, *salvo juramento meo*, refuse the writ. What is to be the consequence of granting it, is another question.

(*a*) *Wilmot's Opinions*, p. 104.

(*b*) The *King* v. *James Winton*, 5 *T. R.* 89.

I see

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I see that in these cases the Court has caused notice to be given to the commissioners, and therefore I will hear them, if they have any thing to say, to-morrow.

July 18.

Mr. *Rose* having stated that two of the commissioners who had issued the warrant were absent from town, and that the third commissioner submitted the question to the judgment of the Court,

Sir *Samuel Romilly*, and Mr. *Cullen*, proceeded to object to the validity of the commitment.

The commissioners are authorised to commit the bankrupt, for not fully answering, to their satisfaction, all lawful questions put to him by them, or refusing to sign his examination (*a*); but it appears on this warrant that the commitment is founded, not on the answer of the bankrupt, but on the deposition of the messenger. For the purpose of deciding whether the answers of the bankrupt are satisfactory, the commissioners are not entitled to resort to extrinsic evidence, but must confine their attention to his answers. In no former instance have commissioners contrasted the testimony of third persons with the answers of the bankrupt; unless the bankrupt's answers are intrinsically unsatisfactory, they will not justify a commitment. If the commissioners were authorized to advert to the deposition of the messenger, it ought to have been stated to the bankrupt, and he should have been examined upon it, and the deposition and examination should both have been set forth in the warrant. The requisition of the statute, that the commissioners shall in their warrant of commitment, specify the questions which they consider not satisfactorily answered (*b*), is designed to secure to the Court, before which the

(*a*) 5 *Geo.* 2. c. 30. s. 16. (*b*) *Ibid.* s. 17.

validity

validity of the commitment may be controverted, the means of deciding whether the answers are satisfactory; and for that purpose the commissioners must specify the whole of the evidence on which their dissatisfaction arises. *Coombe's* case. (*a*) *Brown's* case. (*b*)

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Mr. *Rose* insisted that the warrant was sufficient, or if not, that the alleged insufficiency was formal only, and that the Court, under the provisions of the statute (*c*), must recommit the bankrupt.

The LORD CHANCELLOR.

The questions which remain to be determined are, whether this warrant is sufficient; and, if insufficient, whether the insufficiency is in form or in substance; in the former case another duty is imposed on me, of amending the warrant; and it becomes me to be as sure as my judgment enables me, that I am right, if, in deciding that the warrant is insufficient, I consider the insufficiency to be in substance as well as in form.

In deciding the validity of a commitment by commissioners of bankrupt the Court cannot travel out of the return.

I take it to be clear, that for deciding this question on the return to the writ of *habeas corpus*, the Court cannot travel out of the return. Indeed, it is difficult to know how that could be done; for although the Lord Chancellor has the proceedings under the bankruptcy, in one sense, in his own custody, yet when the party is brought before him by *habeas corpus*, the proceedings must be exactly the same as if he were brought before the common-law Judges; and I cannot conceive how they would have other means than the return, of informing themselves of what passed under the commission. In the present case it is clear that there had been a great deal of examination, before the examination on which the

(*a*) 2 *Rose*, 396.
(*b*) *Ibid.* 400.
(*c*) 5 *Geo.* 2 c. 30. s. 18.

bankrupt

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bankrupt was committed. I make that remark, because, if this subject should ever be discussed elsewhere, it is right to say that this is one of the most insufficient jurisdictions that can exist. It is not possible for the commissioners to address their minds to what appears on the warrant, without being in some measure influenced by what does not appear: and the doctrine that the commissioners could not commit if the bankrupt gave a positive answer, however unsatisfactory, having been over-ruled (*a*), and the Court now being bound to ask itself, on the return of the *habeas corpus*, whether, to a reasonable mind, the answer is satisfactory, I am compelled to decide whether that which is satisfactory to one mind, ought to have been satisfactory to the minds of those who knew thrice as much of the subject of examination; and there is danger of producing an apparent conflict between the original and the appellate judicature, while the real grounds of decision by each are different.

A bankrupt may be committed for answers unsatisfactory, though positive.

After repeatedly reading this warrant, I find it impossible not to believe that the minds of the commissioners, at the time of the commitment, were in some degree influenced by the previous examinations, and not only by what then passed; and I desire to be understood as saying, that I *bonâ fide* know not how any mind can avoid that influence.

Let any man read the warrant, with or without so much as relates to the deposition of the messenger, and

(*a*) That doctrine was adopted in *Pedley*'s case, *Leach*'s Crown Cases, 325., and over-ruled in *Nowlan*'s case. 6 T. R. 118. 11 *Ves.* 511. *Taylor*'s case. 8 *Ves.* 328. *Ex parte Oliver*, 2 *Ves & Bea.* 244. 1 *Rose*, 407. *Ex parte Cassidy*, 2 *Rose*, 217. 19 *Ves.* 324.

ask

ask himself, after reading it, in each of those ways, whether the answer is clearly unsatisfactory?

I read it first without the deposition. The question begins with a statement: "On the 4th of *June* last, when you appeared before the commissioners at *Guildhall*, to pass your last examination, you had no accounts ready to present to them; you then requested the commissioners to adjourn your last examination, undertaking to produce your accounts to your assignees on *Thursday* then next ensuing; on the 14th of *June* you were brought up to be examined before the commissioners, and upon being asked whether you had produced your accounts to your assignees, you stated that you had not, and could not, because your books and papers were in the possession of a friend of yours, a Mr. *Hamilton*, at No. 122, in the *London Road*, to whom you had delivered them since your bankruptcy, who refused to re-deliver them to you." A statement, in effect, that on the 4th of *June* the bankrupt had undertaken to produce his accounts; what passes on the 14th of *June* is an admission that he had not made good that undertaking, but an admission coupled with a declaration that he could not make it good, because his books were in the possession of a Mr. *Hamilton*.

I pass over what relates to the deposition of the messenger. The question is, "Have you any accounts to produce to the commissioners, or any further reason to give why you do not produce them?" That question is addressed to a man who had before stated a reason with which the commissioners did not express themselves dissatisfied; and he answers that he has no other reason: that is not a waiver of his former reason. — "I have no accounts to produce, and I have no further reason to give why I do not produce them, except that I have two petitions before the Chancellor to supersede this

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this commission; the first upon the ground of a commission being now in force against me, bearing date in 1808, and the second, of no act of bankruptcy to this commission, but still am ready to render every account possibly in my power to the commissioners."

The result is, that on the 4th of *June* he undertook to produce the accounts; on the 14th he said, that he had not produced, and could not produce them, and assigned a reason for the non-production; and on his third examination he stated that he could not produce them; that he had no other reason but that before assigned, and that he had presented two petitions to the Lord Chancellor.

Now on the examination thus stated, the commissioners knowing what had passed before, might have known enough to induce them not to believe the bankrupt on his oath; but my mind not having these previous examinations before it, is not in a state to arrive at that conclusion.

Then insert that part of the warrant which relates to the deposition of the messenger. (a) Taking all this representation to be the fact, it might be considered, in this point of view, independent on what the bankrupt had said in his examination; that *Hamilton* evaded those who were in search of them; that they had met a person who had communicated their object to him, and that he refused to deliver the accounts, because they had no right to them. That is not inconsistent with the bankrupt's examination.

The next question is, how am I, according to established principles, to deal with this warrant? I think it has been settled, that where a question is put to a bank-

(a) *Vide ante*, p. 3. 4.

rupt,

rupt on his examination, and in that question is embodied a proposition expressing, as a fact, what he said or did on a preceding day, if he gives such an answer as implies that he does not deny that he said or did so, or does not qualify it, I think it has been settled, even in cases of life or death as *Perrot*'s case (*a*), that the bankrupt must be taken to admit that proposition. In this instance the bankrupt gave no answer, denying or qualifying the statement that he had undertaken to produce his accounts, and he must therefore be considered as having admitted it.

A bankrupt on his examination answering a question which embodies a statement of what he said or did on a former day, without denying or qualifying, is understood to admit, the statement.

I desire to be understood as not expressing any opinion, whether commissioners are at liberty to obtain satisfaction on the subject of the examination, by application to any other person than the bankrupt. Mr. *Cullen* argues that they are not entitled to resort to evidence *aliunde*, for the purpose of deciding whether the bankrupt's answer is satisfactory or not. I leave that question where it is; but the commissioners here have acted on the evidence of the messenger; and then the question arises, have they so stated the evidence on the warrant, that the Court can have the same means, if they are due means, as the commissioners had, of deciding whether the answer is satisfactory? It does not appear on these proceedings that the deposition of the messenger was made in the presence of the bankrupt, or read to him, or that he had any other information concerning it than the terms of the question.

With respect to propositions stated to the bankrupt, in a question addressed to him, relative to acts alleged to have been done, or declarations made by him, one sees the principle on which courts have held (whether it might not have been better to have taken a different course, is another consideration) that

Principle of that doctrine.

(*a*) 2 *Burr.* 1122. 1215.

if

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Not extended to statements of the acts of third persons.

if he does not deny, he is understood to admit the statement; because the question embodies a proposition relative to his own acts or expressions, and he must be presumed to know whether he so did or said: but when the question embodies a proposition relative to acts or words of third persons, the bankrupt may properly be supposed to know nothing about them; and then the point to be decided is, whether the Court, judging on the liberty of the subject, shall be bound to judge without the means of knowing that the statement so incorporated is accurate, and the assurance of forming a correct conclusion on the propriety of the commitment? The Court would never act on any representation of the commissioners that they asked a question such in substance, and received an answer such in substance; the question and answers must be set forth in terms. (*a*) On what principle does the statute require that? On this principle, that the Court before which the bankrupt is brought, by *habeas corpus*, may decide whether the commissioners have not misunderstood the effect of the questions and the answers. The only course for that purpose is to return them *totidem verbis*.

Reason of requiring the commissioners to specify in the warrant the questions, for not satisfactorily answering which, the bankrupt is committed.

The warrant is insufficient in this respect; it refers to a deposition which I cannot read, and of which neither the bankrupt nor the Court can be taken to know, that it is such as it is stated to be on the warrant. It is clear that the deposition had an effect on the minds of the commissioners; they evidently meant to convey that to the bankrupt.

Another question then arises, Is this defect matter of form, or of substance? Where the warrant is defective in form, the Court is required to amend it, and itself

(*a*) 5 *Geo.* 2. *c.* 30. *s.* 17.

to

to make a new warrant. (*a*) This is a defect in substance; as much so as an omission to state an examination subsequent to the original commitment. 1818. CROWLEY'S Case.

Under these circumstances I am not only not required to issue another warrant, but I should not be justified in issuing it.

It seems to me that the question in this case falls very much within the reasoning in *Coombe's* case. (*b*) There, on the return of the *habeas corpus*, it appeared, that there had been an examination subsequent to that in which the commissioners considered the answer of the bankrupt unsatisfactory; then it was impossible for me to judge of the whole matter. They had recommitted him to prison after his second examination; and the question was, whether it was proper to detain him in prison after that second examination, as well as to commit him on the first? I was not supplied with the same means which the commissioners had, of deciding that question, and could not declare the commitment and detention proper.

The distinction established by all the cases is this, that if the commissioners say to the bankrupt, On your former examination you answered to this effect, and he does not qualify that statement, the Court must take it to be true; because he must know whether he said so or no; a hard rule, but now clearly settled. But if the commissioners state that they have derived information from other persons, and the bankrupt does not qualify that statement, I am not bound to take it to be true,

(*a*) 5 *Geo.* 2. *c.* 30. *s.* 18. *Ex parte Cassidy*, 2 *Rose*, 217. 19 *Ves.* 324. *Ex parte Page*, 1 *Barn.* & *Ald.* 568.

(*b*) 2 *Rose*, 396.

 because

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because he has no means of knowing whether or how far it is true. When the commissioners receive facts on the deposition of persons other than the bankrupt, they ought to set out on the warrant the deposition *in hæc verba*; for if they state only what they consider to be the effect of the deposition, the Court before which the writ is brought, is to judge whether the effect of the deposition is such as the commissioners represent, without the means of forming that judgment.

The Court before which the writ is brought must, on the return, have the same means of judging as the commissioners had.

We may safely lay down this as the principle, except so far as the cases break into it, that the Court before which the writ is brought, and which cannot travel out of the return, must, on the return, have the same means of judging as the commissioners had. (*a*) *Perrot*'s case (*b*) seems to me to break into that prodigiously. If the commissioners state that the answers were unsatisfactory, because contradicted by a deposition, how is it possible for me to know whether they ought to have been satisfactory, unless the deposition is returned?

I repeat that this question, whether to a reasonable mind an answer should or should not be satisfactory, experience authorises me to say, imposes as difficult and painful a duty, as the Court can discharge. Chief Justice *de Grey*, and all the other Judges of one Court, thought an answer satisfactory, which another Court unanimously pronounced unsatisfactory. (*c*)

(*a*) *Ex parte Oliver*, 2 *Ves. & Bea.* 244. 1 *Rose*, 407. *Coombe*'s case, 2 *Rose*, 396. *Brown*'s case, 2 *Rose*, 400. *Ex parte Hiams*, 18 *Ves.* 237. *Ex parte Cassidy*, 2 *Rose*, 217. 19 *Ves.* 324.

(*b*) 2 *Burr.* 1122; 1215.

(*c*) Possibly *Miller*'s case, 2 *Bl.* 881. 3 *Wils.* 420, and the remarks of the Court of King's Bench on that decision, in *Nowlan*'s case. 6 *T. R.* 118.

The

The warrant is insufficient, and the prisoner must be discharged. Let the gaoler discharge him, so far as he is in custody under the commissioners' warrant. 1818. CROWLEY'S CASE.

Since the report of this case was prepared, the Lord Chancellor, with a kindness more highly gratifying because unsolicited, has conferred on the editor the signal favor of a communication of Lord *Nottingham's* MSS. From that most valuable collection is subjoined the following statement of the precedents on the authority of which *Jenkes's* friends claimed, and of the reasons that inclined Lord *Nottingham* to withhold, the writ of mainprise. (*Vide ante* p. 14. 15.) The editor has also on some subsequent occasions availed himself of the permission with which he has been honored, to illustrate the doctrines discussed in the course of these reports, by a reference to Lord *Nottingham's* decisions.

" The petition set forth that *Francis Jenkes* was a prisoner by virtue of the warrant annexed, for a fact bailable; that by the ancient usage of Chancery, upon putting in bail there, a writ of mainprise ought to issue, directed to the sheriff or jailer to deliver the party; that the petitioners, being men of good estates, offered themselves as bail, whereof they prayed the acceptance, and a writ of mainprise accordingly. This petition was accompanied with a note of precedents, viz.

" 1. 11 *E*. 3. *pt*. 1. *rot*. *cl*. Mainprise in Chancery for *John Brice*, removed from *Lincoln* to the *Tower*, to appear *coram concilio vel justiciariis nostris vel alibi quandocunque et ubicunque ad faciend. et recipiend. quod per nos vel justic. nostros consideratum fuerit.*

" 2. 11 *E*. 3. *pt*. 1. *memb*. 29. *dors*. *rot*. *cl*. A writ of

 main-

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mainprize directed to the constable of the *Tower*, upon putting in bail in Chancery, to deliver *Bernard Pouche*, committed for felony.

" 3. 11 *E.* 3. *pt.* 1. *memb.* 28, *dorso*, the like directed to the steward and marshall of the household, to deliver *Richard Moneywood*, committed by his majesty's command, for trespass and contempt, *teste* 19 *Martii*, out of term.

" 4. 11 *E.* 3. *pt.* 1. *m.* 28 *dorso*, the like directed to the constable of the *Tower*, to deliver *Henry Compton* committed for felony, *teste* 26 *Martii*, out of term.

" 5. 11 *E.* 3. *pt.* 1. *memb.* 23 *dorso*, the like for *John de Wesenham*, directed as before, committed for felony and divers excesses, *teste* 12 *April.*

" 6. 44 *E.* 3. *pt.* 1. *m.* the like directed *custod. Forest.* for delivery of several persons committed for hunting in forests, *teste* 12 *November.*

" 7. 44 *E.* 3. *m.* 17. the like, *teste* 6 *May.*

" 8. 44 *E.* 3. *m.* 10. the like, *teste* 20 *August.*

" 9. 45 *E.* 3. *m.* 25. the like for *William de Charle*, who stood committed for divers felonies and deceits to the King and his son *John* Duke of *Lancaster*, *teste* 12 *Junii.*

" 10. 3 *R.* 2. *m.* 36. *dorso*, the like writ directed to the sheriffs of *London*, upon bail put in in Chancery, to discharge *Mich. de Swardeston*, and *John Pye*, for designing to go out of the land to prosecute and act many things prejudicial to the king and his people, *teste* 5 *December.*

" 11. *Simile* directed *Vic. Norf. ibm.*

" 12. 3 *R.* 2. *m.* 25. *dorso*, the like in appeal of mayhem, directed to the sheriff of *Hertford*, *teste* 1 *Dec.*

" 13. 3 *R.* 2. *m.* 20. *dorso*, the like for deliverance of a prisoner out of the *Tower* upon bail put in, in Chancery to appear *coram consilio regis quando et quoties usque prox.* *pente-*

pentecost, et ad turrim reintrandum nisi judicium pro deliberatione sua redditum fuerit.

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" 14. 3 *R.* 2. *m.* 12. *dorso*, the like for divers intending *ad mutiland. et interficiend.* directed to the bailiff of the liberty of *Westminster*, *teste* 5 *Febr.*

" 15. 3 *R.* 2. *m.* 11. *dorso*, the like for divers persons charged with divers conspiracies, directed *Vic. Suffolk.*

" 16. 3 *R.* 2. *m.* 7. *dorso, simile de incendio domorum*, directed *Vic. Hertf.* for *Smith* and others, *teste* 5 *Martii*, nine of the like together.

" 17. 3 *R.* 2. *m.* 2. *dorso*, the like directed to the justices of *North Wales*, for *Lloyd*, committed for felony and trespass.

" 18. 3 *R.* 2. *m.* 1. *dorso, supersedeas* for *Ralph* vicar of *Wasteldon*, being accused by an approver for robbery, granted upon bail in Chancery, *quia bonæ famæ.*"

The reasons which " moved Lord *Nottingham* to deliberate upon the writ of mainprize, and for the present to incline against it," are thus stated :

" 1. The writ *de manucaptione capienda*, is grounded upon the statute of *Westminster* 1. c. 15., as to criminal cases; for as to civil cases there is such a writ at the common law, but the application of it to criminal cases is merely by force of the statute.

" 2. That statute was made to provide for the bailment of those who by the sheriffs or lords of leets or others, who had liberties of *infangthef* and *outfangthef*, were kept in prison for small felonies.

" 3. The first line of the statute is *pur ceoque viscounts et autres queux ont prises et retenus in prison gents rettes de felony;* for before the statute, and long after, the sheriffs

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riffs in their turns by warrant of the King's writ or commission did take many indictments of felony.

"4. The mischief recited in the preamble was that these sheriffs and others did (what they pleased) bail those who were not bailable for money, and kept in prison those who were bailable out of malice.

"5. Then the statute proceeds to define the cases of felonies bailable and not bailable.

"6. And then the writ *de manucaptione capienda* came to be applied to these cases; and, as if there had never been any such writ before, the Register 270. b. lays it down for a general rule, *omnia brevia de manucaptione fient sup. stat. W.* 1. *c.* 15., which must be understood of criminal cases only.

"7. The writ which pursues the statute always recites a felony, and an indictment or inquisition thereon founded, and a tender of bail below which has been refused; and then commands bail to be taken, if there be no other case of imprisonment but the felony aforesaid. Vide *Reg.* and *F. N. B.*

"8. Then came the statute of 28 *E.* 3. *c.* 9. which takes away all power from the sheriffs to take indictments in their tourns, by the King's writ or by commission.

"9. And now *Fitzherbert*, and my Lord *Coke* are both agreed that the statute of 28 *E.* 3. has by consequence repealed the writ *de manucaptione capienda*, (*a*) as to criminals; and with them agrees my Lord Chief Justice *Hale* in a little compendious manual of crown learning written by him, a copy whereof is in many hands. (*b*)

(*a*) "*Nota*, the writ *de odio et atia* was also repealed by 28 *E.* 3.; but because it was given by *Mag. Charta*, c. 26., so it is revived by 42 *E.* 3. which repeals all laws against *Mag. Charta*."

(*b*) *Hale*'s Summary of the Pleas of the Crown, 104.; in his larger treatise, however, Lord *Hale* mentions some exceptions. History of the Pleas of the Crown, ii. 141—143.

"13. And

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" 10. And yet *Fitzherbert* for learning sake proceeds to comment upon this writ, as he does also upon the writ *de odio et atia* and many others that are expired; which led many men into mistake who look upon him as a writer in *Henry* the Eighth's time, but penetrate no farther into the matter.

" 11. While the writ was in use, the practice was not to put in bail in Chancery, but to have a writ from thence, commanding others to take bail.

" 12. And yet no doubt there always was and still is a writ *de manucaptione capienda* at the common law in civil cases. As when erroneous judgment is given below, this writ lies to keep a man out of prison, while he prosecutes his writ of false judgment; so if a man brings an appeal of mayhem, and be arrested in an inferior court upon process frivolous on purpose, to hinder that prosecution, this writ lies; *F. N. B.* 250. k. l. *Reg.* 272. The same writ might also have been issued at the common law, in all cases where a man was arrested in debt or trespass, or indicted of trespass *F. N. B.* 251. b. *Reg.* 273. a.; but this is now supplied by 23 *H.* 6. *cap.* 9.

" 13. And in some civil cases a man may come into Chancery and voluntarily tender bail, and shall have a writ to be discharged of his imprisonment. As where a *capias* upon a statute-merchant sued out of Chancery, and the cognisor comes and shows how he has paid part and has a release for the rest, and brings his mainpernors with him to be bound body for body, he shall, upon that manucaption so taken, have a writ to be discharged. *F. N. B.* 251. d. *Reg.* 273. a. b.

" 14. So likewise in some cases which look like criminal; as, if a *ne exeat regnum* or a general *supplicavit* be awarded; if the party, instead of putting in bail before the sheriff or the justices, will come into the Chancery

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and tender bail, which is there accepted, no doubt he shall be discharged by writ from his imprisonment; for in all these and the like cases the Chancery works upon itself, and does, as all other courts may do, quicken or stop their own proceedings.

" 15. But then the question is reduced to this, whether, by the ancient common law, there be a standing power residing in Chancery to accept bailable cases, and to discharge all imprisonments.

" 16. For the power of doing it by the writ of mainprize, which is founded on *W.* 1. *c.* 15., is agreed on all hands to be taken away by 28 *Ed.* 3. *c.* 9.

" 17. It seems not reasonable to believe that any such power should remain in Chancery, either by common law or by statute: 1st, From the non-user of it these 300 years; for *Richard* the Second began his reign *anno* 1377, and yet no precedent of it is offered since 3 *R.* 2. 2. The precedents between 28 *Ed.* 3. and 3 *R.* 2., are to be imputed to the strong current of former practice, it being some considerable time before it began to be understood that the statute of *Ed.* 3., had repealed the writ of mainprize, *viz.* not till 3 *R.* 2. 3. The precedents before that time are for the most part such as concern indictments for felonies and great offences. 4. The case of *F. N. B.* 250. f., where a man, taken by the king's commission, and upon tender of bail in Chancery by his friends, had a writ of mainprize, is of the same nature; for it is not meant of a commitment by the King, but by commissioners of *oyer & terminer*, as appears by the *Register*, 271. a. b., from whence that case is taken, and is the only case of that kind which is extant in the *Register*.

" 18. And it seems less reasonable, if such a power there were, that it should extend to commitments by the King in council: 1. Because if the writ of mainprize desired be

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be founded upon the statute of *Westm.* 1. *c.* 15., then it is plain the statute begins with persons of an inferior nature; *pur ceoque viscounts et auters*, and so can never extend to persons of a higher rank and order, *viz.* lords of the council, &c. 2. If the writ desired be founded upon the common law, or upon the general maxim, that whenever a statute gives a remedy, there the Chancery ought to frame a writ upon it, then it must be observed that it was never yet so practised, though there have been very frequent occasions for it. 6 *Jac. B. R. Cro.* 219, *Addis'* case, committed by the Lord *Chancellor* for certain matters concerning the King; and again 4 *Car.* 1. *Cro.* 233, *Chambers'* case, who was committed by the council in the long vacation, yet no attempt to get out by writ of mainprize, though several petitions were unsuccessful; and long before, *viz. P.* 9 *Eliz.*, *Rich. Constable*, committed to the Tower *per dominos privati consilii*, never asked a writ of mainprize, nor could be bailed till he brought his *habeas corpus*. So *Hilary*, 40 *Eliz.*, *Edward Harcot*, committed *per dominos privati consilii*, never attempted to get out any otherwise than by *habeas corpus*, *vide* Sir *Fra. Moor*, 813. *pl.* 32. (*a*); and the twelve precedents cited by Mr. *Selden* (at the conference in the Painted Chamber) (*b*), when persons committed by the privy council were bailed upon *habeas corpus* brought, do all prove that a writ of mainprize was not then dreamed of or thought practicable. Of these the fourth and fifth were in the time of Queen *Mary*; the sixth, seventh, eighth, ninth, and tenth, in time of Queen *Elizabeth*; the eleventh and twelfth in time of King *James*, but the first was in 18 *Ed.* 3., upon a commitment by the King under his great seal to the

(*a*) Probably 839. *pl.* 182.

(*b*) 3 *Howell's* State Trials, 97—102.

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Tower, when the writ of mainprize was undoubtedly in force, and might have been had in Chancery if the law had extended it to such commitments; but there the bailment was upon a return into *B. R.*, which may serve to answer the precedent of 11 *E.* 3. *m.* 28. cited before. 3. If a man be imprisoned by command of the King, suppose the command unlawful, yet he cannot be delivered by a writ *de homine replegiando;* but justice shall be done by the superior courts upon a *habeas corpus.* 2 *Inst.* 187. How vain were this law, if he might get out by mainprize in the meantime! 4. For mainprize is a greater liberty than bail: he that is bailed is still in the custody of his bail; but he that is mainprized is absolutely at large: again, bail in criminal cases, is an undertaking body for body, and in civil cases is an undertaking to pay the condemnation; but mainprize is no more than an undertaking in a sum certain; see 33 & 36 *E. F. Mainprize*, 12, 13. *arg. d'hab. corp.* 62. 68. 69. 5. The statute 17 *Car.* 1. *cap.* 14. (*a*) enacts, that the judges of the *C. B.* as well as the *B. R.* may grant *habeas corpus*, that the prisoner shall be bailed or remanded within three days after the return, otherwise the Judge shall forfeit treble damages: in this great zeal for public liberty, how was it possible they should forgot to require the Chancellor also to make speedy deliverance in vacation, by writ of mainprize, if any such power had been in him? 6. When the writ of mainprize did lie, the body of the writ always supposed that bail had been first refused below; no man was to come into the Chancery *per saltum*, and turn this Court into a court of gaol-delivery. 7. In all the debates in parliament touching personal liberty, no man ever mentioned this way of coming out; not *Noy*, nor *Selden*, nor

(*a*) 16 *Car.* 1. *c.* 10.

any

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any who argued the *habeas corpus* case; nay, my Lord *Coke*, who strained a point so far as to hold that a *habeas corpus* might be had in Chancery in the vacation, never stirred this point, which surely he would not have overseen; and 2 *Inst.* 190., holds the contrary, and the writ of mainprize to be repealed. 8. If this course may be taken in Chancery, it may as well be in term time as in vacation, and then to what purpose were all these contentions these last sixty years, about the right and remedy of *habeas corpus*, if the remedy by mainprize in Chancery were still extant, for that is much the better of the two?" (*a*)

(*a*) "*Nota*, the statute of 5 *H.* 4. *c.* 10. enacts, That none be imprisoned by any justice of peace but in the county gaol, to the end they might have their trial at the next gaol delivery, or sessions of the peace; so not extended to imprisonment by superior judges; but 2 *Inst.* *43. *contra*, some say it extends to all other judges and justices, for two reasons: 1. *Quia* act declaratory: 2. *Quia ratio legis est generalis*: *Nota*, he does not say it is his own opinion; *et nota ibidem*, he mentions the writ *de bono et malo*, which was a writ that lay to the justices of gaol-delivery, to command them to deliver the gaol of *A. B.*; in which writ there is always a clause, *si A. B. captus et detentus in gaolo pro morte C. D. et non per aliquod speciale mandatum nostrum, tunc deliberetis, &c.*; which exception shows that with such as were committed *per speciale mandatum*, the gaol-delivery justices had nothing to do. *Et nota*, the statute 5 *H.* 4. *c.* 10. cannot extend to all imprisonments, for it saves to the lords and others who have gaols, their franchises. 9 *Co.* 119., *Sanchar*'s case; and the preamble shows the grievance, *viz.* that constables of castles being justices of peace, used to imprison men in their castles; so this statute not meant of all kind of imprisonment."

Rolls.
June 29.
July 1. 6. 21.

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A gift by a husband to his wife, either as a *donatio mortis causa*, or as a *donatio inter vivos* to her separate use, must be established by evidence beyond suspicion: a claim of that nature negatived.

A defendant by her answer having claimed a gift from her husband as an absolute *donatio inter vivos* to her separate use, whether evidence can be received to establish it as a *donatio mortis causa*, *quære*.

THE decree in this cause, dated the 14th of *May*, 1816, declared that the will of *R. P. Hodge* ought to be established, and the trusts thereof carried into execution, and directed a reference to the Master to take the usual account of the testator's personal estate not specifically bequeathed, against the Defendants, *Martha Hodge*, *Edward Dudley*, and *Thomas Hudson*, his executrix and executors.

An order of the 22d of *March*, 1817, on the application of the Defendant *Martha Hodge*, directed that the Master should be at liberty to make a separate report at her expense, as to the personal estate of the testator, possessed by her.

By his separate report of the 8th of *May*, 1817, the Master charged the Defendant *Martha Hodge*, with receipts to the amount of 337*l.* 18*s.* 7*d.*

To this report the Plaintiff excepted, on the ground that the Master had not charged the Defendant *Martha Hodge*, with the sum of 600*l.*, being the amount of sundry bank-notes belonging to the testator at the time of his decease, and possessed by her.

The evidence on the subject of the exception, consisted of the answer of *Martha Hodge* to the original bill, and the deposition of *Alice Mason*.

By her answer the Defendant stated, that the testator, some short time before his death, gave to her a book containing

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containing bank-notes to the amount, in the whole, of 600*l.* or thereabout, but she could not recollect the exact amount; and the testator at the time he gave the bank-notes to the Defendant, informed her they were for her own private use, and that he gave them to her to be at her own disposal, or used expressions to that effect: the answer also stated, that during the life-time of the testator the Defendant expended in various ways some part of the bank-notes, and at the time of his death some of them remained in her possession; and that she considered such bank-notes as her own separate property, and expended them for her own private use, and was wholly ignorant that they legally were the property of the testator at the time of his death.

Alice Mason, the niece of *Martha Hodge*, deposed, that she, being upon a visit at the house of the testator, about eleven days prior to his death, saw him take out of his coat-pocket, and deliver into the hands of the Defendant *Martha Hodge*, a black leather note-case, containing some Bank of *England* notes, but the amount thereof she did not know; that the testator, when he so delivered the note-case, and Bank of *England* notes, told *Martha Hodge*, in the hearing of the witness, that if any thing should happen to him, the contents of the note-case were hers, or expressed himself to that effect; that she could depose that the contents of the note-case consisted of Bank of *England* notes, by reason that upon *Martha Hodge* opening the note-case, almost immediately afterwards, to put in other Bank of *England* notes, the witness saw some Bank of *England* notes in the note-case; that the testator, on the day on which he delivered the note-case, and the first-mentioned Bank of *England* notes, to *Martha Hodge*, had been to the Bank of *England* for the purpose of selling out, and the

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the witness believed that he did sell out, some part of his property in the public funds; and it being then a rainy day, and the testator being wet with the rain, he took his coat off and delivered it to the witness, immediately after he had delivered the note-case, and first-mentioned Bank of *England* notes, to the Defendant *Martha Hodge;* that instantly after he had so delivered his coat to the witness, he took some Bank of *England* notes, but the amount thereof she did not know, out of his said coat pocket, and delivered the same to the defendant *Martha Hodge*, at the same time saying to her, in the hearing of the witness, "These," (meaning the Bank of *England* notes,) "are to be yours also," or expressed himself to that or the like effect; and the Defendant *Martha Hodge* thereupon, in the presence of the witness, opened the note-case, and put the Bank of *England* notes therein. The witness also stated, that the testator was not at the time when he so delivered the note-case and Bank of *England* notes to the Defendant *Martha Hodge* in good health, but was then and for some time previous thereto had been in an indifferent state of health; nevertheless, as appeared to the witness, and as she believed, the testator was in his perfect senses and knew what he was doing, and was not from illness, or any other cause, insensible, or incapable of distinguishing what he did; and that she understood from the expressions addressed by the testator to the Defendant *Martha Hodge*, at the time he so delivered the note-case and the Bank of *England* notes to her, that he intended that the Defendant *Martha Hodge* should keep the note-case, and all the Bank of *England* notes, for her own use in case of his death.

Mr. *Hart* and Mr. *Wingfield*, in support of the exception. There is no evidence that the gift was made in

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in contemplation of death. It is therefore a mere *donatio inter vivos*, and void as an immediate gift by a husband to his wife for her separate use.

Mr. *Bell*, Mr. *Shadwell*, and Mr. *Girdlestone*, for the report. —

The gift is a *donatio mortis causa*. *Justinian Inst. lib.* 2. *tit.* 7. *Bracton, lib.* 2. c. 26. (*a*) It is not necessary

(*a*) " Est autem inter alias donationes donatio mortis causa, quæ morte confirmatur, cujus tres sunt species, una cum quis nullo præsentis mortis periculi metu conteritur, sed sola cogitatione mortalitatis donat: alia, cum quis imminente periculo mortis commotus, ita donat, ut statim fiat accipientis; tertia, ut si quis commotus periculo, non dat sic ut statim fiat accipientis, sed tunc demum, cum mors fuerit insequuta. Et mortis causa donatio potest esse multiplex, ut si quis contemplatione, vel suspicione mortis, alicui dat, cujus modi donationes sæpe fiunt ab ægrotantibus, vel ab eis qui in aciem sunt ituri, vel per mare navigaturi, vel peregre profecturi, et in se tacitam habent conditionem, ut hujusmodi donationes revocentur, si ægrotus convaluerit, si miles ab acie redierit, si nauta a navigatione, et peregrinus a peregrinatione. Et donationes quæ sic fiunt propter mortis suspicionem, morte testatoris confirmantur, et sic fiunt, ut siquid humanitus contigerit de testatore, habeat is, cui legatum est, legatum, si autem convalescat, retineat, vel rehabeat legatum, vel si prius moriatur ille cui legatum est. Et si duo, qui sibi invicem mortis causa donaverint pariter decesserint, neutrius hæres repetet, quia neuter alterum supervixit. Et est re vera talis donatio mortis causa, cum testator, rem legatam se ipsum magis habere voluerit, quam eum cui legata fuerit, et eum, cui legata est, magis quam hæredem suum. Si autem sic donetur mortis causa, ut nullo casu revocetur: causa donandi, magis est quam mortis causa donatio, et ideo perinde haberi debet, sicut alia quævis inter vivos donatio, et ideo inter viros et uxores non valet. Mortis causa donare licet, non tantum infirmæ valetudinis causa, sed periculi, et propinquæ mortis, ab hoste vel a prædonibus, vel ob hominis potentis crudelitatem, vel odium, aut causa navigationis, vel peregrinationis imminente, aut si quis fuerit per insidiosa loca iturus, hæc enim omnia instans periculum demonstravit." fol. 60. a. This passage is compiled chiefly from the authorities in the Civil Law. *Inst. lib.* 2. *tit.* 7. *Dig. lib.* 39. *tit.* 6.

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cessary that such a gift should be made *in extremis;* the donor died on the eleventh day after the transaction, and his expression "in case any thing should happen to him," refers the gift explicitly to the probability of his approaching decease. *Hill* v. *Chapman* (a), *Ward* v. *Turner* (b).

The MASTER *of the* ROLLS.

July 1.

I collect from the proceedings in this case, that the Plaintiffs were not able to prove the receipt of these notes by Mrs. *Hodge* except from her answer, and were therefore under the necessity of reading it: the decree is drawn up on reading the answer. All the passages which it contains, therefore, must be taken, as well those in her favour, as those against her. The question of the validity of the gift depends on the account given by the Defendant in her answer, and by the witness *Alice Mason*, in her deposition. There is no other material evidence.

The account which the Defendant has given is, that it was an absolute gift to take effect immediately: not a word is introduced to make it a conditional gift, depending on the testator's living or not living, and postponing the enjoyment till after his death. It is expressed to be a present absolute gift, vesting immediately, over which she had an instant right of disposition, and of which she did in part dispose during the life of the testator. This statement in the answer differs materially from the deposition of *Alice Mason*. One re-

(a) 2 *Bro. C. C.* 612. (b) 2 *Ves.* 431.

presents

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presents the whole of the gift to consist of the book containing 600*l.*, as one entire gift; the other represents two distinct gifts, with an interval, during which the testator took off his great coat, and afterwards delivered notes not contained in any book. A more material variation is, that *Alice Mason* introduces words which make the gift conditional, that is, "in case any thing should happen to him;" qualifying it not as an absolute gift in all events, but only, for so the expression must be understood, in case of his death. The question is, whether from the accounts so given, the master's report has drawn the right conclusion?

On principle, it is quite clear, that a claimant insisting on a parol gift of this nature, not contained in any will as a legacy, must establish a clear and satisfactory case. If the claim rested only on the account given by Mrs. *Hodge*, it is an absolute gift from a husband to his wife during coverture, without the interposition of trustees; handing over property which she was to apply to her separate use, and which she considered herself at liberty so to apply immediately. There is great difficulty in establishing such a transaction.

But the gift is claimed as a *donatio mortis causa;* a claim which seems to be advanced subsequently to the answer; for that contains not a word intimating that the wife understood the gift to be conditional, which is essential to a gift *mortis causa;* but on the contrary she claims it as an absolute gift, and accordingly disposes of some part of it. A witness has however been examined in the cause, and one difficulty is, whether it is competent to the Defendant to prove a case at variance with the statement in her answer? The conditional gift described in the deposition, is a totally different case

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from the absolute gift claimed in the pleadings. *In limine* therefore occurs the difficulty of receiving the evidence of *Alice Mason* without a basis laid for it in the pleadings. How that can be permitted I do not immediately see. But what is the account which she has given? Her evidence, if taken alone, cannot possibly sustain this claim. She proves only the delivery of some notes, she knows not the amount; she says there were two separate and distinct gifts. Supposing the second gift postponed the right to the notes till the event of death, and gave it only in that event, the question would be whether this falls within the authorities on the subject of donations *mortis causa.*

I have looked through the cases on that subject, which are not numerous. That which approaches nearest to the present is *Lawson* v. *Lawson* (*a*); and the next is *Miller* v. *Miller.* (*b*) That part of the decision in *Lawson* v. *Lawson*, on which Lord *Hardwicke* has remarked (*c*) that he felt some difficulty in understanding it, is explained by a reference to the registrar's book, in the subsequent case of *Tait* v. *Hilbert.* (*d*) The whole doctrine on the subject of donations *mortis causa* has been discussed by Lord *Hardwicke* in *Ward* v. *Turner* (*e*); in which he determined that the subject of the gift must be delivered by the donor; saying, that was what distinguished it from a legacy, which is delivered by the representative. In the next place, the gift must be conditional; that is, depending on the event of death. The three sorts of donations *mortis causa*, and the difficulties concerning the definition, are completely explained in *Tait* v. *Hilbert*, by Lord *Lough-*

(*a*) 1 *P. W.* 441.
(*b*) 3 *P. W.* 356.
(*c*) 2 *Ves.* 441.
(*d*) 2 *Ves.* jun. 120.
(*e*) 2 *Ves.* 431.

borough,

borough, who examined the civil law, and gives the true definition. (*a*)

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Many conditions, you observe, accompany donations *mortis causa*; if the donor recovers, if he repents his gift, if the donee dies before him: the property is not vested absolutely till after death. The Lord Chancellor negatived the claim in that case, considering it as a gift to take effect immediately, and therefore not a conditional donation *mortis causa*.

It becomes the Court to recollect the principles stated by Lord *Hardwicke* in *Ward* v. *Turner* (*b*), who laments that the statute of frauds, which imposes rigorous restrictions on nuncupative wills, had not abolished gifts of this nature; to consider to what perjury such gifts may afford occasion, and how nearly they amount to an evasion of the statutory precautions against nuncupative wills. It is quite evident that if too much facility is afforded to donations *mortis causa*, a door is opened to elude the statute. Lord *Hardwicke* seems to think one witness not sufficient, remarking that the *Roman* law required five witnesses (*c*); afterwards he says, if the case depended at all on the question of fact, he should not venture to determine it, but send it to an issue. In the result he decided not on the fact but on the law, being quite clear that there was not a sufficient delivery.

Hill v. *Chapman* (*d*) has not carried the doctrine farther: The Lord Chancellor there acted upon the report of the Master as to the fact, concerning which there

(*a*) The *Master* of the *Rolls* here read several passages from the judgment. 2 *Ves.* jun. 119., 120.

(*b*) 2 Ves. 431.

(*c*) An innovation of *Justinian*. *Cod. lib.* 8. *tit.* 59. *l.* 4.

(*d*) 2 *Bro. C. C.* 612.

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seems not to have been any doubt, and the law followed. To prove the fact the authorities appear not to require a plurality of witnesses, but only that the proof be satisfactory; nor is it necessary that the donation should be in the last illness; it is sufficient if made in contemplation of death, and on the conditions stated.

To apply these doctrines to the present case. It is evident that, as stated by the Defendant in her answer, the gift possesses none of the essential requisites of a donation *mortis causa*. It had no reference to death; certainly it is not necessary that there should be in words a reference to death, circumstances may supply it; as when a man, an hour before his decease, made a gift the better to provide for his wife: but here a person who had been in a situation to sell stock, returning without being visited by any illness at that time, takes bank-notes out of his pocket, and gives them to his wife, for her own use. What is there to render this a donation *mortis causa?* Not a single circumstance which characterises these gifts, except the *traditio*, occurs in this account.

The deposition of *Alice Mason* is too vague to prove any thing, stating no amount, but only the delivery of some notes inclosed in a case. It describes, indeed, a conditional gift, but wants a fixed quantum; and it differs in material circumstances from the Defendant's statement. All the minutiæ of such transactions are to be examined; the effect depends on every word and minute act.

In such a case, which as a precedent requires much caution, I cannot say that I am satisfied that the party has properly established her claim. The utmost would be,

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be, what was suggested by Lord *Hardwicke*, and done in *Blount* v. *Burrow* (*a*), to send it to a jury. But my difficulty is, whether I ought to receive the evidence, considering what was put in issue by the answer? I cannot overcome that. As that point however was not spoken to, I will not preclude the Bar from an opportunity of urging what further occurs. It seems to me that if that objection cannot be removed, the exception must be allowed. (*b*)

On

(*a*) 4 *Bro. C. C.* 72. 1 *Ves.* jun. 546.

(*b*) To constitute a *donatio mortis causa*, or gift in contemplation of death, the transaction must first possess the requisites of a gift. "By the law of *England*, in order to transfer property by gift, there must either be a deed or instrument of gift, or an actual delivery of the thing to the donee." *Irons* v. *Smallpiece*, 2 *Barn. & Ald.* 552. *Hooper* v. *Goodwin*, *ante*, vol. i. p. 485. A *donatio mortis causa* therefore requires delivery; and the greater part of the cases have occurred on the question, what constitutes a sufficient delivery? *Drury* v. *Smith*, 1 *P. W.* 404. *Lawson* v. *Lawson*, 1 *P. W.* 441. 2 *Ves.* jun. 120. 121. *Miller* v. *Miller*, 3 *P. W.* 356. *Hedges* v. *Hedges*, *Prec. in Cha.* 269. *Gilb. Rep. in Eq.* 12. *Hill* v. *Chapman*, 2 *Bro. C. C.* 612. *Ward.* v. *Turner*, 2 *Ves.* 431. *Jones* v. *Selby*, *Prec. in Cha.* 300. *Hassel* v. *Tynte*, *Amb.* 318. *Smith* v. *Smith*, 2 *Str.* 955. *Blount* v. *Burrow*, 4 *Bro. C. C.* 72. 1 *Ves.* jun. 546. *Tate* v. *Hilbert*, 4 *Bro. C. C.* 286. 2 *Ves.* jun. 111. *Hawkins* v. *Blewitt*, 2 *Esp.* 663. *Shanley* v. *Harvey*, 2 *Eden*, 126. *Bunn* v. *Markham*, 7 *Taunt.* 224. *Gardner* v. *Parker*, 3 *Madd.* 184., and see *Johnson* v. *Smith*, 1 *Ves.* 314.

Thus, money in the public funds will not pass by parol expressions of gift in contemplation of death, accompanied with delivery of the receipts for the price of the stock; *Ward* v. *Turner*, 2 *Ves.* 431., but expressions of gift and delivery of a bond, constitute a valid donation. *Snellgrave* v. *Bailey*, 3 *Atk.* 214. *Gardner* v *Parker*, 3 *Madd.* 184.

The peculiar inducement and circumstances of the gift, annex to it certain qualifications, which may be in general

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On this day the question was argued whether the transaction amounted to an immediate gift by the husband to the separate use of his wife.

Mr. *Bell*,

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comprehended within the description of the incidents of a legacy, to which the gift is analogous. *Dig. lib.* 39. *tit.* 6. *l.* 15. 37. 3 *P. W.* 357.

It is revocable therefore by the donor, *Dig. lib.* 39. *tit.* 6. *l.* 167., and revoked by the death of the donee during his life, *Dig. lib.* 39. *tit.* 6. *l.* 23., and subject to the claims of creditors. *Dig. lib.* 35. *tit.* 2. *l.* 66. *s.* 1. *Dig. lib.* 39. *tit.* 6. *l.* 17. *Smith* v. *Casen*, 1 *P. W.* 406. *Tate* v. *Hilbert*, 4 *Bro. C. C.* 293. 1 *Ves.* jun. 120.; but on the death of the donor the property vests absolutely in the donee; and no probate is required, nor is it the subject of ecclesiastical jurisdiction. *Ashton* v. *Dawson*, *Sel. Ca. in Cha.* 14. *Lawson* v. *Lawson*, 1 *P. W.* 441. *Miller* v. *Miller*, 3 *P. W.* 356. *Ward* v. *Turner*, 2 *Ves.* 440. *Thompson* v. *Hodgson*, 2 *Str.* 777.

The following description well explains the nature of these gifts: a *donatio mortis causa*, "is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will, but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him." Lord *Cowper*, *Prec. in Cha.* 269. 270. *Gilb. Rep. in Equity*, 13.; and see *Thorold* v. *Thorold.* 1 *Phill.* 1.

The genuine definition of *donatio mortis causa*, in the civil law, from which both the doctrine and the denomination are borrowed, may be found in the Institute. *Inst. lib.* ii. *tit.* 7. cited by Lord *Loughborough*, 2 *Ves.* 119, 120.

The subject has been perplexed by an inaccurate enumeration imputed to an ancient jurist. "Julianus libro septimodecimo Digestorum tres esse species mortis causa donationum ait: Unam, cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus, ita donat, ut statim fiat accipientis. Tertium genus esse donationis

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Mr. *Bell*, Mr. *Shadwell*, and Mr. *Girdlestone*, for Mrs. *Hodge*, insisted that a wife may take from the gift of her husband, property to her separate use, without the interposition of trustees; and that in this case the delivery of the notes manifested an intention in the deceased to divest himself of all interest in them, and transfer them to his wife for her own exclusive benefit. *Maclean* v. *Longlands.* (*a*) *Graham* v. *Londonderry.* (*b*) *Lucas* v. *Lucas.* (*c*) *Slanning* v. *Style.* (*d*) *Lee* v. *Prieaux.* (*e*)

Mr. *Hart*, and Mr. *Wingfield*, opposed the claim, on grounds fully stated in the judgment.

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nationis ait, si quis periculo motus, non sic det, ut statim fiat accipientis: sec tunc demum, cum mors fuerit insecuta." *Dig. lib.* 39, *tit.* 6. *l.* 2. *Swinburne*, who translates this passage, (which is adopted by *Bracton*, *ante*, p. 86. n.) remarks that the first two species are mere donations *inter vivos;* on Wills, part i. s. vii.: and the inaccuracy has been censured by the Civilians; *Dig. lib.* 36. *tit.* 6. *l.* 27. 42. It is the last species alone which derives any peculiar properties from its connection with the prospect of death. The whole question is very ably reviewed by Lord *Loughborough.* 2 *Ves.* jun. 118—120. Some of the remarks imputed to Lord *Hardwicke*, 2 *Ves.* 439, 440. seem deficient in precision.

Before the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 19, 20, 21., parol expressions of an intention to give in the event of death, even though, not being accompanied by delivery, insufficient to constitute a *donatio mortis causa*, might have been valid as a nuncupative will. The earliest cases in our courts of law or equity, on the subject of these donations are subsequent to that act.

(*a*) 5 *Ves.* 71.
(*b*) 3 *Atk.* 393.
(*c*) 1 *Atk.* 270.
(*d*) 3 *P. W.* 334.
(*e*) 3 *Bro C. C* 381.

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The MASTER *of the* ROLLS.

After examining the cases cited on the last argument, in which gifts by a husband to his wife have been established in this Court, I am not able to satisfy myself that I ought to change the opinion which I have already pronounced. Here is no sufficient evidence of gift. I will shortly notice the authorities, in order that it may be clearly understood, that in negativing this claim, I do not negative the proposition that, in equity, a gift by a husband to his wife may, under circumstances, be valid, but proceed solely on the insufficiency of the evidence.

In *Maclean* v. *Longlands* (*a*), the Court was of opinion, that the evidence was not sufficient even for sending the question to an issue; but if no gift could in any circumstances be valid, it would have been unnecessary to inquire into evidence. The Master of the Rolls there states the general doctrine thus: "The only point upon which I entertain any doubt, is as to the gift, but I do not think there is sufficient ground to direct an issue. Nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear and distinct act of his, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife." (*a*)

Such is the general doctrine stated in one of the latest cases on this subject: I forbear to advert to others which determine no more than this, that a wife may in this Court acquire property to her separate use during her coverture, and that her husband may be a trustee for her; as in the instance of gifts by stran-

(*a*) 5 *Ves.* 71.

gers,

gers, of which *Lee* v. *Prieaux* (*a*), is an example. In *Lucas* v. *Lucas* (*b*), Lord *Hardwicke* says, "In this court gifts between husband and wife have often been supported, though the law does not allow the property to pass." (*c*) On another occasion, the same judge refers more particularly to the case of the "Countess *Cowper* before Sir *Joseph Jekyll*, in which several trinkets were given her by Lord *Cowper* in his lifetime, and determined to be her separate estate." (*d*)

The case of *Slanning* v. *Style* (*e*) arose on savings of the wife's pin-money, which her husband had borrowed; and the Court thought that by the permission of her husband, she had acquired it to her separate use, and declared her a creditor on his assets.

In *Rich* v. *Cockell* (*f*), Lord *Eldon*, not carrying the doctrine farther than the preceding authorities, represents it as "perfectly settled, that a husband may in this Court be a trustee for the separate use of his wife." (*g*)

The cases mentioned in the former argument, certainly appear to have proceeded on a contrary supposition. In *Miller* v. *Miller* (*h*), Sir *Joseph Jekyll* says, "The gift

(*a*) 3 *Bro. C. C.* 381.
(*b*) 1 *Atk.* 270.
(*c*) 1 *Atk.* 271.
(*d*) 3 *Atk.* 393.
(*e*) 3 *P. W.* 334.
(*f*) 9 *Ves.* 369.
(*g*) 9 *Ves.* 375. See *Harvey* v. *Harvey*, 1 *P. W.* 125. 2 *Vern.* 659. *Bennet* v. *Davis*, 2 *P. W.* 316. *Rolfe* v. *Budder*, *Bunb.* 187. *Tyrrell* v. *Hope*, 2 *Atk.* 558. *Darley* v. *Darley*, 3 *Atk.* 399., 3 *Bro. C. C.* 383. 384. *Davison* v. *Atkinson*, 5 *T. R.* 434. *Lamb* v. *Milnes*, 5 *Ves.* 517. *Hartley* v. *Hurle*, 5 *Ves.* 545., 18 *Ves.* 434. *Parker* v. *Brooke*, 9 *Ves.* 583. *Johnes* v. *Lockhart*, cited 1 *Madd.* 207. corrected, 3 *Bro. C. C.* ed. *Belt.* 383. n. *Adamson* v. *Armitage*, *Coop.* 283. *Ex parte Ray*, 1 *Madd.* 199.
(*h*) 3 *P. W.* 356.

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of 600*l.* contained in the bank-notes was a *donatio causa mortis*, which operates as such though made to a wife, for it is in nature of a legacy;" (*a*) and in *Lawson* v. *Lawson* (*b*), the Master of the Rolls observed that "the delivery of the purse was good; and must operate as a *donatio causa mortis, ut res magis valeat, &c.*, because otherwise one could not give to his own wife." (*c*)

It is unnecessary to cite many of the texts which establish that, by the common law, a husband or wife cannot give to each other without the intervention of trustees. "A man," says *Littleton*, "may not grant, nor give, his tenements to his wife, during the coverture, for that his wife and he be but one person in the law, &c." (*d*) Upon which Lord *Coke*'s commentary is, "This opinion is clear, for by no conveyance of the common law, a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife." (*e*) All the cases in this Court proceed on the ground of exceptions introduced here; as the cases of *paraphernalia*, trinkets, or savings of pin-money. In the single case of 1000*l.* South Sea annuities, tranferred by the husband into the name of his wife in his life-time, the Court thought that so decisive an act, as amounted to an agreement by the husband that the property should become hers. (*f*) That seems to come under the description stated by Lord *Alvanley* (*g*); it is an act; a clear and distinct act, by which the husband divested himself of his property.

The single question, therefore, in applying this doctrine to a particular subject, would be, whether the

(*a*) 3 *P. W.* 357
(*b*) 1 *P. W.* 441.
(*c*) 1 *P. W.* 442.
(*d*) *Sect.* 168.
(*e*) *Co. Litt.* 112. a.
(*f*) *Lucas* v. *Lucas*, 1 *Atk.* 270.
(*g*) 5 *Ves.* 79.

claimant

claimant had satisfactorily established a clear distinct act of the husband, by which he divested himself of the property, and agreed to hold it as trustee for his wife? In this case the claim, as Mrs. *Hodge* in her answer states it, is most suspicious; the claim of a widow, setting up, after the death of her husband, a gift by parol, without the intervention of any third person. The Court expects satisfactory evidence of an act constituting a transfer of the property, and sufficient transmutation of possession. Here the possession is not changed, the possession of the wife is the possession of the husband. It would be a considerable question whether, proposed in this way, without any distinct act, such a claim could be good; but that is not the point here. The claim is distinctly contradicted by the deposition of *Alice Mason*, who was present, and states that it was not an immediate absolute gift, but expressly limited to take effect only in case of any thing happening to the husband. The Defendant and the witness directly contradict each other, one stating a gift absolute and immediate, the other postponing it till death; to which is the Court to give credit? Can it be said that here is that satisfactory evidence which should induce the Court, as a precedent, to establish, after the death of the husband, a gift by parol in his life? I cannot say that the gift is proved to my satisfaction; and the exception must be allowed.

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Jan. 15. 29.
March 4.
June 22.
1819.
April 3. 6. 8. 29.
May 27.
June 10.
August 5. 9.
Nov. 12.

Receiver of rents of estates conveyed to secure an annuity, discharged on acceptance of the price of the annuity with interest, deducting the past payments.

DAVIS *v.* THE DUKE OF MARLBOROUGH.

THE subsequent proceedings in this cause, require a fuller statement of the annuity deed of the 21st of *March*, 1811, under which the Plaintiff claimed, than was thought necessary on the former application, (reported *ante*, Vol. 1. p. 74.) By that deed, made between the Defendant the Duke of *Marlborough*, then Marquess of *Blandford*, of the first part, the Plaintiff of the second part, *Robert Eden*, of the third part, and *Robert Withy*, of the fourth part, after reciting the acts of parliament, and a lease, dated the 21st of *December*, 1808, by which the late Duke of *Marlborough* demised to the present Duke, the manor of *White Knights* in *Berkshire*, for twenty-one years, at a rent of six shillings and eight pence, without impeachment of waste, and the will of *Sarah* Duchess of *Marlborough*, dated the 11th of *August*, 1744, whereby she bequeathed *Marlborough* house, of which she was then in possession, under a lease from the Crown, for the term of 50 years, in trust, first for *John Spencer*, and after his decease, for *George* late Duke of *Marlborough*, for so much of the term as he should live; and after his decease, in trust for such son of his body as should first attain the age of 21 years, his executors, &c. and the testatrix directed her executors to renew the lease as often as there should be occasion during the continuance of the trust, and that such renewed leases should be upon the same trusts; and after reciting that she was possessed, under another lease from the Crown, of certain lands adjoining to the said mansion, for a term then unexpired, she gave the same to her executors, in trust for the owner for the time being of the mansion, and to be enjoyed with the same; and, further reciting that the leases had, since the death

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of the testatrix, been renewed by the late Duke of *Marlborough*, by letters patent, dated the 6th of *June*, 1785, for the terms of 50 years, and 31 years respectively; and that the Marquess of *Blandford*, as eldest son and heir apparent of the late Duke, having then, many years since, attained the age of 21 years, would, by virtue of the acts of parliament, upon the death of his father, become entitled to the manors, mansions, &c. therein comprised, and also to the pension of 5000*l.*, and that he was, by virtue of the will and letters patent, absolutely entitled to *Marlborough* House, subject to the life interest of the late Duke; and reciting that he had agreed with the Plaintiff for the absolute sale to him of an annuity of 155*l.*, during the term of 99 years, if the Marquess should so long live, for the price of 999*l.*, and on the treaty for the sale of the annuity, it was agreed that all costs and charges of preparing and perfecting the securities for the same, and for enrolling a memorial thereof, should be paid by the Marquess; and that in pursuance and part performance of the agreement, the Plaintiff had that day, in his own person, paid the sum of 999*l.* in notes of the Bank of *England*, into the hands of the Marquess; and that in pursuance and part performance of the agreement, on the part of the Marquess, it was intended that he should, immediately after the sealing and delivering the indenture, execute a warrant of attorney bearing even date therewith, to confess a judgment against him in the Court of King's Bench, in an action of debt, at the suit of the Plaintiff, for the sum of 1998*l.*, besides costs of suit; and it was intended and agreed that judgment should be forthwith entered up thereon accordingly; it was witnessed, That in consideration of the aforesaid sum of 999*l.* the Marquess granted to the Plaintiff an annuity of 155*l.* for the term of 99 years, to commence from the day before the date of the deed, if the Marquess should so long live, charged upon and pay-

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able, after the decease of the late Duke, out of the honor, manor, mansion, lands, hereditaments, and premises comprised in the acts of parliament of the 3d and 5th years of Queen *Ann*, respectively, and the pension of 5000*l.*, and to be thenceforth charged upon and payable out of the manor, mansion, &c. of *White Knights*, comprised in the lease of the 21st of *December*, 1808, and subject to the life interest of the late Duke therein, to be charged upon and payable out of *Marlborough* House, and the appurtenances comprised in the will of *Sarah* Duchess of *Marlborough*; to be payable quarterly, the first quarterly payment to be made on the 21st of *June* then next, and a proportional part in case of the death of the Marquess on any other than a day of payment.

The Marquess, for himself, his heirs, executors, and administrators, granted and agreed with the Plaintiff, his executors, &c. that if the annuity should be in arrear for twenty-one days, it should be lawful for the Plaintiff to enter into and distrain upon all the premises charged with the annuity, and to sell and dispose of the distresses there taken, or otherwise to demean therein according to law, in like manner as in distresses taken for rents reserved by lease, to the intent that the Plaintiff, his executors, &c. might be fully paid and satisfied the annuity so in arrear, and all costs and expenses occasioned by the non-payment; and also, that in case the annuity should be in arrear for thirty-one days, it should, although no legal demand should have been made thereof, be lawful for the Plaintiff, his executors, &c. to enter into, and hold, all the premises charged with the annuity, and to receive the rents and profits for his own use, until he should, therewith or otherwise, be fully paid the annuity due at the time of every such entry, and which should afterwards accrue due during his possession

session of the premises, together with all costs and expenses which he should sustain by reason of the non-payment thereof, such possession when taken to be without impeachment of waste.

In the deed were inserted covenants by the Marquess with the Plaintiff, for the payment of the annuity; that he would, at the request of the Plaintiff, appear in person, as often as there should be occasion, upon notice, at any office of insurance, or to any underwriters within the cities of *London* or *Westminster*, or send notice of his place of abode, and if necessary, certificates of his being living, and of the state of his health, in order that the Plaintiff might insure the Marquess's life, for any sum not exceeding 999*l.*; and that, in case the Marquess should on any occasion leave this kingdom, or do any other act whereby the Plaintiff should be put to any extra expense in insuring the Marquess's life, he would pay to the Plaintiff such sums as should be defrayed in such extra insurance, and it should be lawful for the Plaintiff to receive such sums out of the premises charged with the annuity. The deed contained a demise by the Marquess for securing the payment of the annuity (at the appointment of the Plaintiff,) to the Defendant *Eden*, of the manor of *Woodstock*, *Blenheim* House, and all the premises comprised in the letters patent of the 5th of *May*, in the 4th year of *Ann*, to hold to *Eden*, his executors, &c. from the decease of the late Duke, for the term of 500 years, if the Marquess should so long live; and an assignment by the Marquess to *Eden*, his executors, &c. of the manor of *White Knights*, and all the premises comprised in the lease of the 21st of *December*, 1808, and all woods, underwoods, trees, and plantations then standing or growing thereon, and also *Marlborough* House, and all the premises comprised in the will of *Sarah* Duchess of *Marlborough*, to hold the premises

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comprised in the lease of the 21st of *December*, 1808, for the residue of the term of 21 years, subject to the rent and to eight annuities; and to hold *Marlborough* House, and the other premises, for the residue of the terms of 50 years, and 31 years, then unexpired, and for any terms which might be created by any renewed leases.

It was declared that *Eden*, his executors, &c. should be possessed of the premises, upon trust, to permit the Marquess to receive the rents until the annuity should be in arrear by the space of 50 days, and as often as it should be in arrear for that time, out of the rents and profits, or by demising, mortgaging, or selling the premises, or any of them, for all or any part of the several terms thereby granted and assigned, then subsisting, or which might be created by any renewed leases, or by bringing actions against the tenants or occupiers of the premises, for the recovery of the rents and profits thereof, or by felling timber, or cutting underwood, or by sale of fixtures and other things in and about the premises, or by more than one, or by all, of the ways and means aforesaid, or by such other ways or means as to him or them should seem meet, to raise such sums of money as would be sufficient, or as he or they should think proper or expedient to raise, for paying to the Plaintiff, the annuity in arrear, and all costs and expenses which the Plaintiff and *Eden*, or either of them, might sustain, by reason of the non-payment thereof, or otherwise in the execution of the trusts; and to pay the surplus of the money so raised to the Marquess. It was also agreed and declared, that if the annuity should be in arrear by the space of three calendar months, (whether or not payment should afterwards be made and accepted of the arrears of the annuity, before any sale or mortgage should be made under the present power,)

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power,) it should be lawful for *Eden*, his executors, &c. and he was authorised and required, in case the same should be directed by the Plaintiff, his executors, &c. by writing, absolutely to sell and dispose of all the manor, mansion-houses, and other premises comprised in the terms of years created by the recited lease or letters patent, or any renewed term which might be created, and also to sell and dispose of the timber and underwood growing thereon, and the fixtures and other things in and about *White Knights*, or to mortgage the same premises, or any part thereof, for any sums whatsoever, and that it should be lawful for *Eden*, his executors, &c. to enter into, make, and execute, all such covenants, contracts, agreements, assignments, assurances, acts, deeds, matters and things, which he should deem reasonable; and that all such contracts, agreements, &c. which should be entered into or executed by *Eden*, his executors, &c. by virtue thereof, should and might be entered into and executed, either with or without the concurrence of the Marquess, his executors, &c. and should, whether he should or should not join therein, or assent thereto, be, to all intents and purposes, completely valid and effectual, and bind him, his executors, &c. and all persons claiming under or in trust for him: and that the receipts in writing of *Eden*, his executors, &c. for any sums payable to him in the execution of the trusts, should be good and effectual discharges for the same; and that the person to whom the same should be given, should not afterwards be accountable for any loss, misapplication, or non-application, or be in any wise obliged to see to the application, of the money.

It was then declared, that *Eden*, his executors, &c. should stand possessed of the money raised by such sale or mortgage, upon trust, first to pay and redeem the

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eight prior annuities previously recited, and to pay all sums due to persons claiming under two indentures of the 23d of *July*, 1806, and the 1st of *June*, 1808; and also to pay and satisfy all annuitants, judgment creditors, and other incumbrances affecting the premises; and out of the residue to reimburse himself the costs and expenses to be incurred in the execution of the trusts, and invest the surplus in his name, in the purchase of stock or public funds, or at interest on government or real securities, and out of the interest, dividends, and annual produce, or the principal, in case such interest, dividends, and annual produce, should be insufficient, to pay the annuity of 155*l.*, and all arrears and future payments thereof; and subject thereto, should stand possessed of the trust-monies in trust for the Marquess.

The Marquess also assigned to *Eden* the pension of 5000*l.*, to hold from the decease of the late Duke, for the life of the Marquess, upon trust, to secure the annuity of 155*l.*; and for that purpose the Marquess appointed *Eden* his attorney, to demand and receive the pension from the commissioners of the post-office, and to use all other means for the recovery of the same; and the Marquess and *Eden* appointed *Withy* their receiver and attorney, to collect and receive the rents and profits of all the premises thereby demised and assigned, with various powers and a salary, upon trust to secure the annuity; but it was provided that the receiver was not to act unless the annuity should be in arrear for six calendar months.

The deed contained covenants by the Marquess, that the recited lease and letters patent were good and subsisting; that he had power to grant, demise, and assign, the estates, with the timber, and the pension; and that he would, at his own expense, on the request of

Eden,

Eden, execute farther assurances of the estates, and the timber, underwood, and fixtures, during the residue of the terms then unexpired, and also for any farther terms, not exceeding 500 years, which the Marquess might, by the death of the late Duke or otherwise, be enabled to grant therein. The deed contained a proviso that the Marquess might repurchase the annuity, on giving seven days' notice to the Plaintiff, and paying the arrears, and all expenses occasioned by non-payment, and the sum of 1037*l.* 15*s.*

The memorial stated, that the sum of 999*l.*, the consideration of the annuity, was paid to the Marquess, out of which he immediately paid the costs of preparing and perfecting the several securities, and of preparing and enrolling a memorial, pursuant to an agreement made upon the treaty for the purchase of the annuity.

The order pronounced on the motion for a receiver before answer, reported *ante*, volume i. p. 74., was as follows: "His Lordship doth order that it be referred to Mr. *Jekyll*, one, &c. to appoint a proper person to be receiver of the rents and profits of the capital mansion-house called *Blenheim* House, and the park called *Woodstock* Park, and all other the estates and premises to the Defendant the Duke of *Marlborough* belonging, and mentioned and comprised in three acts of parliament in the pleadings mentioned, of the 3d and 5th years of the reign of her late Majesty Queen *Anne*, chapters 6, 3, and 4.; but the appointment of the said receiver is not to affect prior incumbrancers upon the said estates and premises, who may think proper to take possession of the said estates and premises, by virtue of the said securities respectively; and it is ordered that the said Master do also allow to such person, so to be appointed, a salary for his care and pains therein, he first giving security

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to be allowed of by the said Master, and taken before a Master extraordinary in the country, if there shall be occasion, duly and annually to account for and pay what he shall so receive, as this Court has hereby directed, and shall hereafter direct; and the Defendant, the Duke of *Marlborough*, is to deliver up the possession of the said estates and premises to the said receiver, but subject as hereinafter mentioned; and the tenants of the said estates and premises are also to attorn and pay their rents in arrear and growing due to such receiver, who is to be at liberty to let and set the said estates, with the approbation of the said Master, as there shall be occasion, but subject also as hereinafter mentioned; that is to say, that this order is not to affect or extend to the rents and profits of any part of the said estates and premises, to which any person or persons are entitled, under any execution or executions executed, nor to require the tenants of such parts of the said estates and premises to attorn, nor to require the Defendant the Duke of *Marlborough* to deliver possession of any part of the said estates and premises, which he may hold as tenant under any person or persons claiming such part by virtue of any execution or executions executed; and it is ordered that the said Master do inquire what incumbrances there are affecting the said estates and premises, and also into the priorities thereof respectively; for the better discovery whereof the parties are to produce before the Master, upon oath, all deeds, &c., and to be examined upon interrogatories as the said Master shall direct; and it is ordered that the person so to be appointed receiver as aforesaid, do, out of the rents and profits so to be received by him, keep down the interest and payments in respect of the said incumbrances, according to their priorities, and pay the balances thereof, which shall be from time to time reported due from him, into the bank, with the privity of the accountant-general, to be there placed to the credit of

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of this cause, subject to the farther order of this Court; and his Lordship doth not think fit to make any order as to the appointment of a receiver of the pension of 5000*l.* in the pleadings mentioned." 5th *March*, 1818. Reg. Lib. A. 1817, fol. 873.

By amendment under an order dated the 7th of *March*, 1818, the judgment creditors were made defendants. The amended bill prayed an account of the arrears of the annuity; that the amount might be raised, and the future payments secured, by sale or mortgage of the estates and premises comprised in the indenture of 21st *March* 1811, for the terms thereby assigned, or for any further or renewed term or interest therein since acquired by the Duke of *Marlborough*, or in trust for him, or by felling timber, or cutting underwood, or sale of fixtures thereon, or otherwise, and out of the pension of 5000*l.*; a reference to inquire what incumbrances affected the estates, and their priorities, and what was due thereon respectively; that the plaintiff's annuity might be decreed to be paid according to its priority, and in preference to the alleged mortgage, to the defendants mortgagees; and that the judgments obtained by the other Defendants against the Duke, might be declared void against the Plaintiff, and the other creditors of the Duke, and that the defendants might be decreed to deliver up possession of the estates recovered by such judgments, and that an account might be taken of the rents and profits of the estates comprised in the indenture of *March*, 1811, received by the said Defendants, and that the same might be applied in payment of the plaintiff's annuity, and of the other incumbrances affecting the estates, according to their priorities; that a receiver might be appointed to collect the rents and profits of the estates and the pension; and that in the meantime the Duke be restrained by injunction from felling timber, or cutting underwoo

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or selling fixtures upon the premises comprised in the indenture of *March*, 1811.

June 22.

On this day the plaintiff moved, that the order for the receiver might be varied, and extended to the judgment creditors.

Mr. *Hart* and Mr. *Seton*, in support of the motion.

Mr. *Bell* and Mr. *Roupell*, against the motion.

The LORD CHANCELLOR.

The former order proceeds on the principle of not affecting the rights of parties not before the Court. The judgment creditors are now defendants; it appears that their judgments are subsequent to the plaintiffs' annuity; and other debts may be suggested. It will be sufficient to expunge so much of the order as excepts them from its operation. I cannot order a judgment creditor in possession to attorn.

Mr. *Bell* and Mr. *Roupell* then applied that Mr. *Withy* might be declared at liberty to propose himself as receiver; on the ground that, in the annuity deed, it had been agreed by the Plaintiff and the Duke, that he should hold that office.

The LORD CHANCELLOR.

A Receiver appointed by the Court, is appointed on behalf of all parties.

A receiver appointed by the Court, is appointed on behalf of all parties, not of the Plaintiff, or of one Defendant only. (*a*) I see no reason for releasing Mr. *Withy* from any difficulties which prevent his appointment.

(*a*) *Hutchinson* v. *Lord Massareene*, 2 *Ball & Beat*, 55.

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The following order was pronounced. "23d *June*, 1818, His Lordship doth order that so much of the order made in this cause appointing a receiver, bearing date the 5th day of *March* last, as directs that such order is not to effect or extend to the rents and profits of any part of the said estates and premises to which any person or persons are entitled, under any execution or executions executed, nor to require the tenants of such parts of the said estates and premises, to attorn, nor to require the Defendant the Duke of *Marlborough* to deliver possession of any part of the said estates and premises, which he may hold, as tenant under any person or persons claiming such parts, by virtue of any execution or executions executed, be expunged; and it is ordered that the Defendant the Duke of *Marlborough* be restrained by the injunction of this Court, from felling timber, or cutting underwood, or selling fixtures, upon the estates and premises comprised in the indenture of the 21st day of *March*, 1811, in the pleadings of this cause mentioned, until the farther order of this Court." Reg. Lib. A. 1817. fol. 1537 — 1539.

The answer of the Duke submitted, whether, according to the acts of parliament, the estates and pension comprised therein could be assigned or charged with the payment of any sums of money; and whether the Plaintiff ought to recover his annuity, the whole consideration not having been paid to the Duke, inasmuch as 87*l.* 11*s.* were claimed thereout by the solicitor of the Plaintiff, for preparing the securities for the annuity; and, offering to pay to the Plaintiff the principal money advanced, with interest, farther submitted whether an account ought not to be taken of the principal actually

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advanced and paid by the Plaintiff to the Duke, and the interest due thereon, and credit to be given to the Duke for the money he had paid, and interest thereon, and what had been levied by distress. The answer also stated, that persons by whom judgments had been entered up against the Duke were his *bona fide* creditors; and declared his intention to fell timber, and cut underwood, and sell fixtures, on the premises comprised in the indenture of the 21st of *March*, 1811.

1819. *April 3.*

On this day, the Duke having previously given notice of a motion to discharge the receiver, the Plaintiff moved that it might be referred to the master to cause a survey to be made, under the direction of the receiver, of such timber and other trees, and also the underwood standing on the estate at *Blenheim* and *Woodstock* Park, comprised in the acts of parliament, not ornamental to, or shelter for, the mansion called *Blenheim* House, as was fit and proper to be felled, for the purpose of having the same felled and sold, under the direction of the Court, to satisfy to the Plaintiff the money due to him, pursuant to the authority given to him for that purpose by the indenture of the 21st of *March*, 1811.

Mr. *Hart* and Mr. *Seton*, in support of the motion, insisted, that notwithstanding the restraint imposed by the acts of parliament on his right of alienation, the Duke was entitled to fell timber on the estates. The Court has already decided that over the estates, the Duke possesses a power of alienation as against himself (*a*); the restraint on alienation to the prejudice of his successors is analogous to the restraint imposed by

(*a*) *Ante*, vol. 1. 74.

the

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the statute (*a*) on women seised of lands *ex provisione viri*; and it is settled both at law and in equity, that such tenants are not impeachable of waste, and that timber felled by them is their own absolute property. (*b*)

Sir *Arthur Pigott*, Mr. *Wray*, and Mr. *Hampson*, for the Duke, in opposition to the motion.

The order sought is not necessarily consequential on the appointment of a receiver; and before the Court proceeds farther in execution of the annuity deed on which the plaintiff's claim is founded, it will require the obvious objections to its validity to be removed. It is now the rule of this Court, that a party who seeks its interposition to enforce the contract of an heir apparent dealing for his expectancy, shall establish the adequacy of the consideration, and the general fairness of the transaction. The Duke has assigned his reversionary interest to secure an annuity of 155*l.* commencing immediately, and continuing during his life, for a sum of 999*l.* His answer states legal objections to the validity of the grant. *Peacock* v. *Evans.* (*c*) *Gowland* v. *De Faria.* (*d*)

The LORD CHANCELLOR.

Omitting at present the consideration of the particular policy of the acts of parliament, relative to these estates, this case may be compared to the common case of a marriage settlement, in which the first taker is made tenant for life without impeachment of waste, and with powers of leasing, from the operation of which are excepted the mansion-house and park. It has never been held that such an exception exempts the mansion from execution either at law or in equity, during the

A mansion-house excepted from the leasing power of a tenant for

(*a*) 11 *H.* 7. c. 20.

(*b*) *Williams* v. *Williams*, 15 *Ves.* 419. 12 East, 209.

(*c*) 16 *Ves.* 512.

(*d*) 17 *Ves.* 20.

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life, is subject to execution at the suit of his creditors, during his life.

the life of the tenant for life. More special words are required to protect the life-estate from the rights of creditors.

After reading the deed under which the Plaintiff claims, I feel a strong inclination not to interfere in this case, if I can avoid it. The nature of that deed has not yet been sufficiently unfolded in argument. Supposing that I was right in appointing a receiver, a question remains, whether in such a state of the cause, more particularly, regard being had to the nature of this deed, the Court will, *per saltum*, enable any one to cut down timber, prior to a decree?

The deed, after reciting the acts of parliament, a lease of *December* 1808, and the will of *Sarah* Duchess of *Marlborough*, recites the title of the Defendant then *Marquess* of *Blandford* as "eldest son and heir apparent" (in that very character he contracts,) of "*George* Duke of *Marlborough*." I do not mean to speak positively, but as far as I recollect, the mature age of an heir apparent dealing for his reversion is not a circumstance that divests him of the benefit of the principle which prevails in a court of equity, that parties dealing with him for his expectancy, must show that the transaction is unexceptionable. (*a*) The consideration of the annuity was little more than six years' purchase. All the expenses were to be paid by the Marquess; and he executes a warrant of attorney which, though as a peer in his own right during the life of his father, his person was protected, would authorise execution against all his property real or personal, even not comprised in the deed. The annuity is charged on the estates only from the decease of the then Duke of *Marlborough*, nor

(*a*) *Vide post*, p. 143.

was

was it in the power of the Marquess to charge them sooner, but the first payment is to be made on the 21st of *June* ensuing the date of the deed; so that the Marquess contracted a personal obligation to pay the annuity from that day, even during the life of the Duke, the estate being chargeable only, as alone it could be charged, from the Duke's death. There is then a covenant or agreement, always to be found in these annuity deeds, that if the annuity should be in arrear for 21 days, the Plaintiff may distrain on the premises charged. That clause is in terms, a covenant by which the present Duke of *Marlborough*, there being no qualification limiting the entry only to the period after the death of the late Duke, would have been liable in damages, if the Plaintiff could not have entered during the life of the late Duke. The covenant, authorising entry and receipt of rents, is also unqualified, unless, which the Court would labour to do, it can be qualified by construction; but, in terms, neither the power of entry to distrain, nor the power of entry for perception of rents and profits, is qualified by restriction to the period after the death of the late Duke. Then follows a personal covenant for payment of the annuity, and for appearance at insurance-offices, to enable the Plaintiff to insure the Duke's life, and for payment of the increased expenses of insurance consequent on his going abroad.

The annuity is next secured by a demise to *Eden*, a demise which, undoubtedly, in general words, includes woods; but one question to be considered here will be, whether, as by that demise the lessee is not unimpeachable of waste, he could touch the woods at all? It is worthy of consideration whether, under a demise of all lands, woods, tenements, &c., without words expressly

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pressly protecting the lessee from impeachment of waste, the lessee has any estate which entitles him to cut timber? It is a question of law whether, if the estate is granted not without impeachment of waste, the declaration of trust can so alter the estate as to give a right to cut timber by virtue of the estate? The title created by the demise, whatever it may be, is on the trust the declaration of which follows; and the question would be, whether, if there is a declaration of trust which authorises the lessee to cut timber, which his interest in the estate would not authorise, that can amount to more than agreement that the lessee shall enter and cut timber? And whether this Court will execute that agreement? And farther, whether it will give a power of entry for that purpose prior to the decree? The declaration of trust in this deed requires particular attention from a court of equity. (*a*)

With reference to this declaration it is to be considered, as I before mentioned, whether by virtue of a demise which is itself not unimpeachable of waste, there is any power to cut timber, or whether that power being given by agreement, contained in a declaration of trust, the power rests in any thing but agreement? Whether it arises from interest in the estate, without any such declaration; or arising out of the agreement, beyond what would arise from the nature of the estate, it amounts to any thing more than covenant and agreement? Other powers are given in the event of an arrear of the annuity during three months (*b*); most extensive powers; though I do not mean to say that, in that respect, this deed proceeds beyond annuity deeds in general; which is nearly impossible. *Eden* is then directed to stand possessed of the money raised by the

(*a*) See the clause *ante*, p. 112—114. (*b*) *Vide ante*, p. 110.

means

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means provided, in trust to pay eight annuities mentioned, and all persons claiming under two deeds referred to; so that there may be many annuitants and judgment creditors not there specified, and for that reason not parties, and, with respect to whom, therefore, there must be inquiry.

The result of these powers appears to be, that in the event of the arrear of the annuity for a specified period, it was competent to *Eden* to sell all these estates, for the terms comprised in the deed, to convert them into money, and after satisfaction of the incumbrances, to invest the surplus in stock; and thus to give to the Duke of *Marlborough* a personal interest in that fund, as contradistinguished from the real interest which he had in some of these estates, and in the timber.

There follow, an assignment of the pension of 5000*l.* on the same trust; a proviso for redemption; and an appointment of Mr. *Withy* as receiver and attorney, with very large powers.

One of the first questions, in such a case will be, whether it is so clear, on any motion that can be made in a court of equity, considering the parties to this instrument, and its provisions, that there must finally be a decree to carry it into execution, that the Court will anticipate, by giving before decree, the relief which, if the Plaintiff is entitled to relief, may then be given? Or, considering all the provisions made by the grantor, and for persons who are not parties, and the fact that the demise not only authorises the trustee to strip the estate of all timber, but when entry is made under the term, the entry is not to continue merely until the arrears of the annuity are paid, but gives an unlimited power

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power over the whole property, to sell it absolutely, and convert it into a pecuniary interest, or to keep possession of it, subject to the interests which that possession would create; whether it is so clear that the Plaintiff will eventually be entitled to relief, that when there is nothing more than yet appears to enable the Court to decide, it would be fit now to give the relief which the Plaintiff seeks, even if it would be fit that on a decree relief should be given? The case certainly must be considered in that view.

The present motion raises two questions; whether the receiver is the person whom the Court will entrust with this duty in relation to the timber? And, a question in effect preliminary to the former, whether the receiver should be continued? If he is not continued, he cannot be the proper person. The fittest motion, therefore, to be first heard is that for discharging the receiver.

In appointing the receiver I proceeded on these grounds. Looking at these several acts of parliament, it did not occur to me that the pension act bore much on the other acts. I might be too hasty in that opinion. The first Duke was at one time tenant in fee of this property; in order to settle it on his posterity, and with large aids from the public, (a circumstance material in reference to the policy imputable to the acts,) the first Duke reduced himself to the condition of tenant for life without impeachment of waste, and it appeared to me therefore, that, he might cut all timber which a tenant for life without impeachment of waste might cut; and I thought it impossible to hold that what a tenant for life might do, could not be done by a tenant in tail under the same settlement. With

respect

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respect to the leasing powers, I reasoned in this way, considering this as the settlement of an estate not public property. It is familiar that the estates of the first nobility in the kingdom are limited to them for life, with powers of leasing of all natures required, but with an express exception from those general powers, declaring that they shall not be at liberty to lease, beyond a very limited time, any of the mansion-houses or parks; but the only inference that I have ever known drawn, in the administration of justice, from the existence of such a limitation of the power is, that a lease which exceeds the power is void; I never knew that it was not competent to the tenant for life by deed to charge his life estate in those premises which were excepted from his general leasing powers, or that he could protect them against execution. No one ever contended that, because those portions of the property were exempted from the leasing powers they were, therefore, protected from the claims of creditors. A tenant for life without more, possesses a power of leasing arising out of his estate, and determining, therefore, with his life. The leasing powers in a common settlement, prescribing a limited term, rent, &c. will not affect the power incident to the estate of the tenant for life, to lease during his life, as he pleases.

In this case there have been executions against the life-estate of the Duke of *Marlborough*; if so, then by analogy, this Court will put a receiver in possession, where the claim is equitable not legal; and if in the acts of parliament there is sufficient to prevent the application of the law in the manner which I now state, it had escaped me. If there were two judgment creditors who, under the opinion of the Court of King's Bench, had each of them extended a moiety of *Blenheim* House, and by their judgments could obtain possession, it appeared

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peared to me that either that Court was wrong, or *Blenheim* House must be subject to be taken by the Duke's creditors in equity as well as at law; there could be no more reason why it should not be taken under an equitable, than under a legal, charge. The case must be argued on the ground that there is no distinction in principle, supposing no objection to arise to the claim of the equitable creditor from the nature of his contract, as a dealing with an heir apparent.

April 6.

Sir *Arthur Piggott*, Mr. *Wray*, and Mr. *Hampson*, in support of the motion to discharge the receiver.

The Duke is himself not entitled to fell timber. On an information and bill filed by the Attorney-General, and persons having reversionary interests in the estates, against the Duke, the Vice-Chancellor has granted an injunction to restrain the Duke from cutting timber, on the principle that the power to commit waste, though incident to the estate of a tenant in tail, would be inconsistent with the intention the legislature has declared for the security of this property.(*a*) By the express provisions of the act, the Duke cannot bar the descent; by the judicial construction of those provisions, he cannot commit waste; upon what principle can the receiver, the agent of this annuitant, claim rights which, even if so disposed, the Duke could not execute? The effect of this order will be to place the receiver in possession of the estate, which the legislature has expressly provided for the enjoyment of the Duke and his posterity. If the tenor of the acts of parliament had been

(*a*) The *Attorney General* v. The Duke of *Marlborough*, 3 *Madd.* 498.

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been fully stated to the court(a), no receiver would have been appointed. It is true, that at the date of the limitation of the estates by those acts, the fee simple had been already conveyed to the Duke of *Marlborough*, by a former grant from the crown, and in the creation of those limitations, therefore, the estate moved from him; but at that time, the mansion of *Blenheim*, with its magnificent fixtures and gardens was not in existence; the mansion was built and the gardens were formed by the national bounty; in these consists the value of the property; and they were the gift of the crown and parliament, designed for the personal enjoyment of the Duke and his posterity, the possession of which should be inseparably annexed to the descent of the title.

If this estate descended to an heir female of the Duke, her husband would not be tenant by the curtesy, nor would a Duchess dowager be entitled to dower.

The estate was conferred and embellished as a durable monument of the achievements of the Duke; and the crown, representing the public, is interested in its preservation, by analogy to the legal principle which protects the right of the heir in monuments erected to the honour of his ancestor, even against the owner of the ground on which they stand. (b)

The LORD CHANCELLOR.

To what extent is that argument urged? Neither the receiver nor any creditor could dismantle the property,

(a) In addition to the statutes cited on the former argument, the counsel for the Duke now referred to stat. 1 *Geo*. 1. stat. 2. c. 12. s. 54.

(b) *Co. Litt.* fol. 18. b. and the cases cited in the notes.

or

or exercise over it any other power than the Duke possessed.

For the motion to discharge the receiver,

The Duke is not at liberty so to alien the estate as to exclude himself from residing there.

Mr. *Hart* and Mr. *Seton* for the plaintiff, Mr. *Wetherell* and Mr. *Tinney* for prior incumbrancers, against the motion to discharge the receiver.

The contract is not a dealing with an heir for his expectancy; it is not reversionary, but immediate. A present personal security cannot be vitiated by the provision of a future auxiliary fund, when the grantor shall obtain by possession. At least the judgment is valid; it was never pretended that a judgment is void because the person against whom it has been entered happens to be an expectant heir. The principles established by *Gowland* v. *De Faria* (a), and the cases of that class, are confined to sales, and have never been extended to mere securities. The principle of those decisions only imposes an obligation to prove the fairness of the transaction; the plaintiff has given that proof. In all those instances, the whole contract has been rescinded; but here only part of the property assigned was reversionary; can the court rescind the whole contract, in order to protect a part of the property? At the utmost, the Duke can be relieved against the deed only on payment of principal, interest, and costs. If ever the court would interpose by the appointment of a receiver before a decree, it is in a case like this, in which the owner of the estate, who contends that he possesses no power of alienation, has undertaken to

(a) 17 Ves. 20.

alien

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alien it, and has given possession to judgment creditors; and here denying his right to grant an authority to cut timber, has pledged himself, by an appeal from the judgment of the Vice-Chancellor, to assert that right.

The deeds under which the incumbrancers prior to the Plaintiff claim, provide for them the same remedies by sale of timber and otherwise, to which the Plaintiff is entitled, and no objection therefore arises from those benefits reserved by the Plaintiff's annuity-deed to persons not parties to it, for whom they were already secured.

The licence to cut timber gives the same right as if the term had been expressly created without impeachment of waste. At common law a lessee for years was entitled to commit waste; since the statute of *Marlebridge*, which restrains his right, the proper mode of exempting him from the restriction in the statute, is a licence. (*a*) In *Comyns's Digest* (*b*) it is distinctly stated, on the authority of a case in *W. Jones* (*c*), that "if tenant for life without impeachment, leases for years, waste does not lie against the lessee for years; for his estate is derived from him, who was dispunishable."

(*a*) The words of the statute are, "Item firmarii tempore firmarum suarum, vastum vel exilium non facient de boscis, domibus, vel hominibus, nec de aliquibus ad tenementa quæ habent ad firmam spectantibus, nisi specialem inde habuerint concessionem, sive conventionis mentionem, adeo quod hoc facere possint," *c.* 23. *Vide post*, p. 145. *n.*

(*b*) *Waste*, (c. 5.)

(*c*) *Bray* v. *Tracy*, *W. Jones*, 51. See *Nudgate's* case, *Moor*, 72., *Dal.* 72., and *Gill* v. *Rudor*, *Cary*, 90.

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The LORD CHANCELLOR.

The question whether the Duke can alien *Blenheim* House, must be the same at law and in equity. When I found that judgment creditors had extended it by *elegits*, I felt a difficulty in denying a like relief to equitable creditors. It may be a question whether those who assert that there is neither legal nor equitable right to take possession of this property, should not make application to the Court which has issued those executions: but while courts of law hold, that *Blenheim* House may be taken on legal execution, courts of equity cannot consistently hold, that it is not to be taken on equitable execution. With respect to waste, the first Duke of *Marlborough* was tenant for life, expressly without impeachment of waste; and it would be very difficult to contend that those who succeed him, being tenants in tail, have a less right; but the power of alienation over this estate must depend on the legal construction of the acts of parliament, and ought to be determined in a court of law. On the policy of those acts, this must be argued as a case in which the legislature, intending wholly to prevent alienation, has forbidden some modes of alienation, and made no mention of others. That is a singularity in this question.

In favor of equitable creditors the Court will appoint a receiver on property, against which a legal creditor might obtain execution.

The LORD CHANCELLOR.

April 8

If this case is to be decided on that policy, which is acknowledged only in courts of equity, the policy extending a peculiar protection to heirs, it is purely a question of equity; if, on the other hand, it is to be decided on the construction of the acts of parliament, and it is insisted that under that construction no creditors can lay hold of *Blenheim* House, even during the

life of the Duke, so as to exclude him, and prevent his excluding them if he thinks proper, that is a legal question; and the difficulty under which the Duke there labours, is, that the case is presented to me, when two judgment creditors, by virtue of their judgments, have taken possession of the house and park.

No motion is made in the cause to which the Attorney-General is a party, but the point at issue is simply this, whether I ought to discharge the receiver? That depends first, on the question whether he ought to have been appointed, regard being had to the nature of the plaintiff's claim and the nature of the Duke's estate? If the nature of the estate is to be considered as to the question whether an equitable execution can be levied, if I may use that expression, against the house and park, that may be properly argued here on principles peculiar to a court of equity; but the question on the meaning of the acts of parliament is a legal question, and I have no concern with that except to take the opinion of a court of law, unless there are equitable grounds for protecting the Duke, not as heir apparent, but as Duke of *Marlborough*. The construction of the acts must be the same in courts of law and equity, but there may be a peculiar principle which this Court will apply to the acts, though it agrees in the construction with the court of law.

Courts of equity may apply a peculiar principle to acts restraining alienation, in the construction of which they agree with courts of law

The point at law arises on this very deed; for the question would be, whether any estate passed at law by virtue of the demise? If it is determinable with the Duke's life, still the point would arise, because it is contended that the Duke cannot exclude himself from the possession of the estate. The question is, whether these statutes, by imposing express restraints on alienation, have destroyed all the implied incidents of the

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life-estate? It has been insisted before me, that the Duke could not, by his own act, put into possession of these estates, any person whom he could not remove at his pleasure. — A strong proposition.

It is argued also, that the receiver ought to be discharged, because if this were the case of an ordinary tenant for life, not under the restraints which affect the Duke, the deed is such as this Court would not enforce. There is another view in which I put it, that if the receiver is appointed at all, it must be because *Eden* or the Plaintiff, (which is the same thing), has an estate created for 500 years, if the Duke should so long live; but if, according to the true intent and meaning of the acts, the Duke could not demise the estates, as by this deed he has attempted to demise them, his incapacity must exist at law, as well as in equity, and ought to be established before the receiver is discharged.

It has been decided in this court, that the grantor of an annuity void by the annuity act, may come here, and have the annuity deed delivered up, without repaying the consideration-money, though that is recoverable at law (*a*); but he cannot obtain relief on those terms, after he has, by his bill or answer, submitted to repay the consideration, as in Doctor *Battine's* case; the annuitant then is entitled to be repaid, not under his judgment, but under the grantor's submission.

When this case originally came before me, I collected that the annuity was granted to the Plaintiff for the life of the Duke of *Marlborough*, and could not be charged on the estate of the late Duke, of which he was tenant in tail, so as to inforce immediate payment

(*a*) *Vide post.* p. 157. *n.*

out

out of *Blenheim* House, but might be so charged on *White Knights*. Accordingly, the annuity is granted to issue out of *White Knights*, from the date of the deed, and out of *Blenheim* House from the death of the late duke. It was stated to me, according to the uncontroverted fact, that two creditors had, under *elegits*, extended moieties of *Blenheim* House and Park; and were then in possession; the question then made was, whether this annuity could be considered as well charged on the different subjects on which the deed purported to charge it? Independently on the effect of other parts of the instruments, and of the acts of parliament, it is impossible to say, that it could not be charged on *White Knights* immediately, and on *Blenheim* House, from the death of the late Duke, unless prevented by the principle of policy applied by this court to persons in the situation of expectant heirs. The question was in some measure discussed, whether the Duke of *Marlborough* could charge the property with an annuity for his life?

I considered it thus; the acts had made the first Duke tenant for life, without impeachment of waste, and the succeeding Dukes tenants in tail, (I am aware of the difficulties in reference to tenantcy by curtesy and in dower), and had expressly restrained the Duke from granting leases beyond twenty-one years, and expressly excluded from that power, *Blenheim* House and the Park of *Woodstock*. (*a*) The first Duke, being tenant for life

(*a*) "Be it further enacted, &c. That the said Duke of *Marlborough*, and after his decease, the said Duchess of *Marlborough*, shall have full power and authority, by deed indented, to make any lease or leases in possession, of all or any of the said manors, hundred, messuages, lands, tenements, and hereditaments aforesaid, (other than and except the house called *Blenheim*, and the park

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life without impeachment of waste, it was clear, independently on the question of equitable waste, might cut timber; and it was difficult to contend that a tenant in tail under the act, had not equal powers with a tenant for life without impeachment of waste; it was clear too, that unless there was something in the act which required me to put on it a construction different from that which prevails in the ordinary cases of settlements of great estates, the leasing power in which, and the exclusion of the mansion-house and park, are almost in words embodied in this act, it would be quite a new idea that, because the tenants for life could not make a lease to bind those who succeed them, except in the terms prescribed, and could not lease the mansion-house or other excluded places, beyond their own lives, it was to be contended, from an instrument of such a nature, that the rights which a tenant for life had, as incident to his estate, were not existing, though not affected by the terms of the instrument. The ordinary rules are applicable to estates granted by the crown itself, for the maintenance of dignities, with reversion in the crown, which therefore cannot be barred. I never heard that persons to whom such grants have been made, have not, during their lives, the usual incidents to their estates; or that their creditors could not take them in execution. It had escaped me if the pension-act, which I read, bore on this question. When, therefore, it has been argued, not only that we are to look to the policy of this court with regard to expectant heirs, but that these acts are

Estates granted by the Crown for the maintenance of dignities, with reversion in the Crown, have the usual incidents, and may be taken in execution.

park of *Woodstock*), for any number of years, not exceeding one-and-twenty years, or for any number of years determinable upon one, two, or three lives, reserving the best and most improved rent that can then be had for the same, without taking any fine." 5 *Anne*, c. 3. s. 4.

to

to be construed at law and in equity, with reference to a peculiar purpose of the legislature, that is a question the determination of which, I have considered, must probably be the same at law and in equity; and if the present motion is to turn on the point, whether the Duke of *Marlborough* can grant these incumbrances by virtue of his estate, supposing it to be an estate for life without impeachment of waste, or whether the incidents to an estate for life are taken away, as well as the other restraints imposed, it would be the duty of this court first to hear the decision of a court of law. If that question was decided, another circumstance requiring observation is, the difficulty attending the policy of the acts, (in addition to the protection with which we surround expectant heirs in this court,) on the argument that the legislature in passing them, contemplated restraints beyond that variety which they have specified; that, the legislature having considered what acts tenants in tail might, and what they might not, perform, and therefore what restraints should be imposed, and having expressly imposed some restraints, the court is called on to say, what restraints are to be implied, from statutes thus expressly imposing some, and not imposing others. On that question I shall observe only, that it furnishes a great deal of argument.

Another point requires more consideration; namely, whether, without adverting to the acts of parliament, this is a case in which the court should have granted a receiver? The rule I take to be, that the court will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates: in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession,

Doctrine on the appointment of a receiver in behalf of equitable creditors.

if

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if they think proper (*a*); and with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill, will be given when a decree is pronounced, the Court will not expose parties claiming that relief, to the danger of losing the rents by not appointing a receiver of an estate, on which it is admitted they cannot enter (*b*). The question then will be, whether, considering the provisions of this deed, the Court, in the present stage of the cause, is to interpose by the appointment of a receiver? That may be put thus, whether it is sufficiently clear that the Court will, on the hearing, lend its aid to a plaintiff such as the present?

The grant of the annuity first recognizes in the Duke, then Marquess of *Blandford*, the character to which this Court applies, what it calls its policy, that is, the character

(*a*) But they must first obtain the leave of the Court, *Bryan* v. *Cormick*, 1 *Cox*, 422. *Anon.*, 6 *Ves.* 287. *Angel* v. *Smith*, 9 *Ves.* 335. *Brooks* v. *Greathead*, 1 *Jac. & Walk.* 176. *Gresley* v. *Adderley*, *ante*, vol. 1. 579.

(*b*) In this case the receiver was appointed before answer. The earlier instances of the appointment of a receiver before answer seem to have proceeded on the ground of fraud, and danger to the property; *Vann* v. *Barnett*, 2 *Bro. C. C.* 158. *Hugonin* v. *Basely*, 13 *Ves.* 105. *Middleton* v. *Dodswell*, 13 *Ves.* 266. *Lloyd* v. *Passingham*, 16 *Ves.* 59. *Scott* v. *Becker*, 4 *Price*, 346.; and see *Jervis* v. *White*, 6 *Ves.* 738.; but in later cases the Court has granted that prompt relief to a party possessing a clear equitable title, by analogy to the ejectment of a legal incumbrancer; *Duckworth* v. *Trafford*, 18 *Ves.* 283. *Metcalfe* v. *Pulvertoft*, 1 *Ves. & Bea.* 180.; and see *Maguire* v. *Allen*, 1 *Ball & Beat.* 75.

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character of eldest son and heir at law. Beyond doubt he is dealing for his expectancy and reversion, because he is dealing for what the legislature endeavoured to annex to the dignities of which he was expectant heir. Feeling, as I profess to feel, that in many cases those who obtain relief from their annuities, have really taken as much advantage of the annuitants as those annuitants have taken of them, I must still admit it to be clearly established, that, if a person has dealt with an heir apparent, for interests of which he is not in present possession, this court extends to the heir the benefit of this principle, with reference to those so dealing with him, that it does not rest on him to shew that the bargain was unreasonable and improvident, but on them to shew that it was reasonable. (*a*) The mere fact that the

Liability of persons dealing with an heir apparent for his expectancy.

(*a*) The general result of the cases seems to be, that expectant heirs dealing for their expectancy, are entitled, for mere inadequacy of price, to have the contract rescinded, upon terms of redemption; *Knott* v. *Hill*, 1 *Vern.* 167. 2 *Vern.* 27. 2 *Ca. in Cha.* 120. 2 *Cox*, 80. *Barney* v. *Beak*, 2 *Ca. in Cha.* 136. *Batty* v. *Lloyd*, 1 *Vern.* 141. *Wiseman* v. *Beake*, 2 *Vern.* 121. 2 *Freem.* 111. *Barney* v. *Tyson*, 2 *Vent.* 359. *Berney* v. *Pitt*, 2 *Vern.* 14. 2 *Rep. in Cha.* 396. 1 *P. W.* 312. *post* p. 142. *Twisleton* v. *Griffith*, 1 *P. W.* 310. *Dews* v. *Brandt*, *Sel. Ca. in Cha.* 7. discredited arg. 1 *Bro. C. C.* 7. *Cole* v. *Gibbons*, 3 *P. W.* 290. *Curwyn* v. *Milner*, 3 *P. W.* 293 n. *Barnardiston* v. *Lingood.* 2 *Atk.* 133. *Earl of Chesterfield* v. *Janssen*, 2 *Ves.* 125. 1 *Atk.* 301. 1 *Wils.* 286. *Baugh* v. *Price*, 1 *Wils.* 320. *Gould* v. *Oakden*, 4 *Bro. P. C. ed. Toml.* 198. *Gwynne* v. *Heaton*, 1 *Bro. C. C.* 1. *Peacock* v. *Evans*, 16 *Ves.* 512. *Gowland* v. *de Faria*, 17 *Ves.* 20. compromised on appeal, *Sugden Law of Vendors*, 231 *n. k.* *Roche* v. *O'Brien.* 1 *Ball & Beatty*, 330. *Darley* v. *Singleton*, *Wightw.*, 25. *Bowes* v. *Heaps*, 3 *Ves. & Bea*, 117.; and see *Varnee's case*, 2 *Freem.* 63. *Brooke* v. *Gally*, 2 *Atk*, 34. *Freeman* v. *Bishop*, 2 *Atk.* 39. *Barnard*, 15. *Evans* v. *Cheshire*, *Belt*, *Supplement*, 300. *Coles* v. *Trecothick*, 9 *Ves.* 234. 246., the proof of adequacy

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the annuity was bought at six years' purchase, cannot render the grant improvident: many annuities purchased at

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adequacy lying on the purchaser. *Gowland* v. *de Faria, ubi supra. Shelly* v. *Nash*, 3 *Madd.* 236. *Bernal* v. *Marquess of Donegal*, 3 *Dow.* 151.

This doctrine appears to be founded in part on the policy of maintaining parental authority, and preventing the waste of family estates, 1 *P. W.* 312. 313. 3 *P. W.* 293. 1 *Wils.* 323. 2 *Ves.* 144. 155. *et seq. Barnard*, 6. 1 *Bro. C. C.* 9, 10., purposes which the civil law pursued by the *Senatus consultum Macedonianum*, *Dig. lib.* xiv. *tit.* 6., and for which, in the earlier periods of our jurisprudence, the court of Star Chamber seems to have assumed penal jurisdiction, see the *dictum* of Lord *Nottingham, post* p. 143. n. cit. 2 *Ves.* 139. and *Hudson's Treatise.* 2 *Coll. Jur.* 111. and in part on the equity of protecting against the designs of that calculating *rapacity* which the law constantly discountenances, the *distress* frequently incident to the owners of profitable reversions, and the *improvidence* with which men are commonly disposed to sacrifice the future to the present. 2 *Atk.* 135. *Barnard*, 341. 343. 2 *Ves.* 149. 155. *et seq.* 1 *Atk.* 346. 353. 1 *Wils.* 323. 3 *Ves & Bea.* 119.

The latter principle seems to comprehend every description of persons dealing for a reversionary interest; but it may be doubted whether, the course of decision authorises so extensive a conclusion; and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir. The reversionary interests, the sale of which has been rescinded for mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor, in every case except the following: in *Wiseman* v. *Beake. Cole* v. *Gibbons*, (on the original transaction in which, unconfirmed, Lord *Talbot* considered the plaintiff entitled to relief,) *Barnardiston* v. *Lingood*, and *Bowes* v. *Heaps*, they were expectant on the decease of the reversioner's uncle; and, in *Gould* v. *Oakden*, on the decease of his wife's father. But in all these cases the sale had been transacted while the vendor was in distress. In *Nicholls* v. *Gould*, 2 *Ves.* 422.

at that price, have not been set aside. Whatever may be the estimated value in the tables, where, I understand, fifteen

422. *Reg. Lib. B.* 1[illegible]*l.* 523., Lord *Hardwicke* refused to rescind the sale of a reversionary interest on the ground of inadequacy of price alone; and see *Griffith* v. *Spratley*, 1 *Cox*, 383. 2 *Bro. C. C.* 179. n. *Montesquieu* v. *Sandys*, 18 *Ves.* 302. In *Henley* v. *Axe*, 2 *Bro. C. C.* 17, a bill filed to set aside the assignment of a portion of a reversionary interest, expectant on the decease of the plaintiff's uncle, was dismissed on the ground of the adequacy of the consideration; but it appears from the registrar's book, that an inquiry on that subject had been directed by consent. The plaintiff, being entitled under the will of *Robert Henley* to an estate tail, expectant on the decease of his uncle without issue, in estates to be purchased with a fund of 28,245*l.* 9*s.* 2*d.* 3 *per cent.* stock, the produce of other estates sold under an act of parliament, in consideration of an annuity of 200*l.* payable during the joint lives of the plaintiff and his uncle, on 7*th April*, 1773, executed a bond and an assignment of the whole or a sufficient part of the fund for securing to the defendant 6000*l.*, payable on the death of the uncle without issue. The uncle died in *April* 1779, and in *April* 1780, the bill was filed to set aside the bond and assignment, on paying to the defendant what was a fair price for the grant of the annuity, and the plaintiff obtained an injunction to restrain proceedings on the bond. On 13th *March* 1781, it was ordered that the plaintiff should, in a week from that time, transfer 1800*l.* 3 *per cents.* to the Accountant-General in trust in the cause, and should be restrained from receiving any part of the 28,245*l.* 9*s.* 2*d.* until further order, that the injunction should be continued to the hearing; and that the plaintiff should invest the 28,245*l.* 9*s.* 2*d.* in a purchase of lands. On 13th *Dec.* 1783, upon the application of the defendants, alleging that no proceedings had been had under the order, and that the parties were desirous that the transactions relating to the annuity might be referred to one of the Masters, to state whether the sum of 6000*l.* was a fair price, the plaintiffs consenting, the lords commissioners ordered a reference to inquire and state

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fifteen years' purchase are allowed, I believe that six years have been considered, to use an expression which, though

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state to the Court, whether the sum of 6000*l.*, secured to be paid in manner, and at the time, and upon the contingencies, mentioned in the bond and indenture, was at the time of the grant, a fair price for the annuity, and the injunction was continued until the report. *Reg. Lib.* A. 1783. *fol.* 107. 28th *July* 1785. The exception taken by the plaintiff to the Master's report was overruled. *Reg. Lib.* A. 1784. *fol.* 701. 10*th October* 1785, upon the petition of the defendant, the cause was ordered to be set down, on further decisions, *Reg. Lib.* A. 1784. *fol.* 675. In Hilary Term 1786, the bill was dismissed, 2 *Bro. C. C.* 17; but no entry of the dismission appears in the register.

It has been decided that the rule is not applicable to sales of reversionary interests by auction, *Shelly* v. *Nash*, 3 *Madd.* 232.; and specific performance has been decreed of an agreement by an heir, on the marriage of his daughter, to settle one-third of such real estates as should descend to him at the death of his father. *Hobson* v. *Trevor*, 2 *P. W.* 191. 10 *M*[illegible]07.; but see *Carleton* v. *Leighton*, 3 *Mer.* 667. *Harwood* v. *Tooke*, cit. 1 *Madd.* Princ. and Pract. of Chanc. 549.

The following note of an early case on this subject, (one branch of which has been reported under the names of *Berney* v. *Pitt*, *ubi supra*,) is copied from Lord *Nottingham's* Manuscripts. *Vide ante*, p. 83.

" 9 *Feb.* 33 *Car.* 2. 1680. *Berney* was drawn into several securities, for money to be paid after his father's death, who then was infirm and kept alive by art, by some of which securities he was to pay five for one; and by this means was involved in debt to the value of 50,000*l.* or 60,000*l.*; in all which he appeared to be circumvented and beset, most of the money pretended to be borrowed being raised by the delivery of wares at excessive prices in parcels of wine, hemp, cambric, jewels, which could never be sold for a quarter of the price at which they were delivered; but the plaintiff's necessities for money being increased by having his creditors under-hand procured

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though it should never have come into this court, cannot now be thrown out of it, as the market-price of an annuity. (a)

According to the decisions in this court, I do not think that years make much difference in the protection afforded to an expectant heir. (b)

In the privilege of an expectant heir, age is not material.

The Duke, in his answer, has offered to repay the consideration-money, but I think that I must now look at the case as if the Plaintiff declined to receive it. If there is a question whether the Duke has not the incidents belonging to an estate for life, that arises precisely under this deed, because, if he has not, the demise and

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procured to fall upon him, he was willing to make up money upon any terms, and gave statutes and judgments of great penalties; against which he now prayed relief by bill. 1. I made him pay the principal money borrowed, before I would grant an injunction till hearing. 2. At the hearing, I relieved him against all the rest, notwithstanding he were of full age at the time, for this infamous kind of trade and circumvention ought by all means to be suppresed; the Star Chamber used to punish it, and this Court did always relieve against it. No family can be safe if this be suffered. *Fairclough*, *Smith*, *Beak*, *Mason*, *Tyson*, *Pargiter*, were Defendants; but Mr. *George Pitt* prevailed, and the bill against him was dismissed, though he gained above three for one; for it was in the time of the father's health, three years before his death, without any circumvention or practice, and upon *express* agreement to lose the principal if the son died in the life of his father, which differed it from all the other cases."

(a) See 5 *Ves.* 616. 6 *Ves.* 274.

(b) *Wiseman* v. *Beak*, 2 *Vern.* 121. 2 *Freem.* 111. *Barney* v. *Tyson*, 2 *Vent.* 359. *Twisleton* v. *Griffith*, 1 *P. W.* 310. *Gould* v. *Oakden*, 4 *Bro. P. C. ed. Toml.* 198. *Wightw.* 28., and the judgment of Lord *Nottingham*, *ante*, in this page.

charge

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charge are bad; if he has, independently on the other objections, they are good.

On the former occasion I determined not to appoint a receiver of the pension, because the appointment would have been useless. The pension is payable only into the hands of the Duke, and the receipt of the receiver would not be a sufficient discharge. If the policy of these acts operates to the extent which has been contended for, it would be impossible for the annuitant to put in execution the power of distress, against any part of the property within their protection.

With reference to heirs apparent dealing for their expectancies, it is too late to urge in this court, that the grantee may insure or omit to insure the granter's life; Lord *Thurlow* in one case said, that insurance might now be made with so much ease and certainty, that he would always pay attention to the circumstance, whether it was to be made at the expense of the party granting the annuity. Here it is to be made at the Duke's expense; at least in case, by his leaving the country, or other acts, it becomes necessary to pay a larger premium than if he appeared personally at the insurance-offices, those increased expenses are to be sustained by him.

Effect of lease by tenant for life without impeachment of waste, not declaring that the lessee should not be impeachable for waste, but with a licence to fell timber.

If the Court is to consider whether the Plaintiff can take timber by virtue of the demise and covenant, a considerable question will arise; but the doctrine stated from *Comyns's Digest* is very material; because the question would be, whether, if the estate of the Marquess of *Blandford* was not subject to impeachment of waste, and he demised for years not expressly declaring that the lessee should not be subject to impeachment of waste, but with a declaration of trust, amounting to a licence

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licence to fell timber, the lessee would be authorised to fell? (*a*) But the doctrine of that case is to be observed on

(*a*) "If I lease for life, and afterwards grant to the tenant that he shall not be impeached for waste, he cannot plead that in bar, but shall have an action of covenant." *Fineux* Chief Justice, 21 *H.* 7. 31., and see *Dalton* v. *Gill*, *Cary*, 90. The important question discussed, but not decided, in the text, depends on the nature of the rights enjoyed by the tenant of a particular estate, without impeachment of waste; rights concerning which much difference of opinion has occurred.

By the common law no prohibition of waste could be maintained against a tenant for life or for years, deriving his interest from the act of the lessor, *Reg. Brev.* 72. 21 *H.* 6. 38, 21 *H.* 8. 6, *Bro. Abr.* Waste, 88. 139. *F. N. B.* 55. *Doctor* and *Stud.* l. ii. ch. 1, 2. *Co. Litt.* 54. a. 4 *Co.* 62. 2 *Inst.* 145. 299. *Bacon's Works*, vol. iv. p. 224. that remedy being confined to persons who derived their interest from the act of law, namely, tenant in dower, guardian, and, according to some authorities, tenant by the curtesy.

But it seems that during the continuance of the particular estate, timber on the land demised, was, as annexed to the inheritance, the property of the lessor, or person entitled in remainder. *Co. Litt.* 57. a. n. 2. *Herlakenden's* Case, 4 *Co.* 62. *Paget's* Case, 5 *Co.* 76. *Lifford's* Case, 11 *Co.* 46. *Bowles'* Case, 11 *Co.* 79. 1 *Rol. Rep.* 177. 3 *Lev.* 209., the tenant having a limited interest in it for the enjoyment of its shelter and produce. 10 *H.* 7. 2. *Bro. Abr.* Waste, 143. and the authorities last cited. And timber, therefore, severed from the land by the waste of a tenant for life or years, was, at common law, the property of the owner of the inheritance.

Thus in *Berry* v. *Heard*, *W. Jones*, 255. *Cro. Car.* 242, (the report of this case in *Palm.* 327., seems imperfect,) trees having been felled on an estate demised for years, the majority of the judges of the Court of King's Bench, on an action of trover by the lessor, held that at common law, the lessor might have seised the trees, (see the quotation from *Bracton*, *post*, p. 148. n.,) and that the statute of *Glocester* had not

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on with a distinction; for this question must be considered with reference to the peculiar estate of the Duke of

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not deprived him of his common law right, but had added a new optional remedy, by action; and see *Udal* v. *Udal*, *Aleyn*, 81. 2 *Roll. Abr.* 119., and Lord *Bacon's* elaborate argument on the case of impeachment of waste, in the Exchequer Chamber, *Works*, vol. iv. p. 212—232. Some expressions, however, in *Doctor and Student*, lib. ii. c. 1., appear to imply an opinion, that the property in trees severed by waste, was acquired by the tenant.

The privilege of estovers incident by the common law, to the estate of a tenant for life or years, *Bracton*, fol. 217. a., see *post*, p. 148. n. *Bro. Abr.* Waste, *pl.* 89. 112. 130 *Dyer*, 19. b. *Co. Litt.* 41. b., affords a confirmation of the doctrine, that timber severed by waste was not the property of the tenant; the express recognition of a qualified, seems an implied negative of an absolute, right.

The statute of *Marlebridge*, 52 *Hen.* 3. c. 23., prohibited "*firmarii*" from committing waste, "*nisi specialem inde habuerint concessionem*," under the penalty of restitution to the party, and fine to the king. The statute of *Glocester*, 6 *Ed.* 1. c. 5., authorised the issuing a writ of waste against tenants by the curtesy, or in other manner for life, or for years, or tenants in dower, and inflicted on a tenant committing waste, the forfeiture of the place wasted, and treble damages.

It seems, therefore, that before these statutes, a clause declaring a lease for life or years to be without impeachment of waste, might have been in use, *Bowles'* Case, 11. *Co.* 81. b.; and its effect would have been to transfer to the lessee the property in timber severed. *Ibid.* After the statutes the clause became effectual for another purpose, namely, as a licence of the lessor to protect the lessee from the penalties incurred by waste.

This doctrine, however, is opposed by considerable authorities; by the express opinion of Lord *Hardwicke*, that "at common law, the clause, *without impeachment of waste*, only exempted tenant for life from the penalty of the statute, the recovery

of *Marlborough*, and to what might raise a doubt between a future Marquess of *Blandford* on the subject of felling

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covery of treble value and place wasted; not giving the property of the thing wasted;" *Aston* v. *Aston*, 1 *Ves.* 265. and by the very learned and ingenious argument of his illustrious predecessor, already cited, *Bacon*'s Works, vol. iv. p. 212—232.; but the weight of reasoning and authority seems decidedly with Lord *Coke:* and it is now clearly settled, notwithstanding the doubts which have at different times prevailed, *Fitz. Abr.* Waste, *pl.* 8., citing 27 *H.* 6. *Dyer*, 184. *pl.* 63. *St. Leger*'s Case, cited, *Moor*, 327. *Finch*, v. *Finch*, cited, 4 *Co.* 63. a. (probably the same case, see 6 *Co.* 63.) *Herlakenden*'s Case, 4 *Co.*62. *Abrahall* v. *Bubb*, 2 *Freem.* 53. 2 *Show.* 69. 1 *Ves.* 265. (*a*) *Bishop of London* v. *Web*, 1 *P. W.* 528., that since the statutes of *Marlebridge* and *Glocester*, the clause without impeachment of waste, not merely affords a protection from the penalties which those statutes impose, but authorises a tenant for life or years, to convert to his own use, timber severed from the estate. *Co. Litt.* 220. a. *Bowles* Case, 11 *Co.* 82. b. 83. b. 1 *Roll. Rep.* 177. *Hob.* 132. *Secheverel* v. *Dale*, *Poph* 193. *Latch.* 163. 268. *Pyne* v. *Dor.*, 6 *T. R.* 55. 3 *Atk.* 216. *Williams* v. *Williams*, 15 *Ves.* 425. *Burgess* v. *Lamb*, 16 *Ves.* 185. See *Partridge* v. *Powlett*, *Ca. Temp. Hardwicke*, 254.

The precise effect of that clause is to give "a power to the lessee which will produce an interest in him if he executes his power during the privity of his estate." *Bowles* Case, *ubi supra.;* but it gives a power only, not an interest, until severance, according to the distinction expressed by two of the judges. 1 *Roll. Rep.* 182., and *Poole*'s Case, *Salk.* 368. *Rep. Temp. Holt.*

(*a*) Since this note was prepared, the editor has been honoured with a communication of Lord *Nottingham*'s manuscripts, (*vide ante*, p. 83.); they contain a report of *Abrahall* v. *Bubb*, and of an earlier case, *Skelton* v. *Skelton*, which will be found particularly valuable; *vide post.* p. 170. *Freeman*, in his report of the former, seems to have confounded the two cases.

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felling timber, the Duke being not tenant for life, but tenant in tail, subject to such restraints as the policy of

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66.; and the reasoning of Lord *Bacon*, Works, vol. iv. p. 225.; but see *Anon. Mos.* 237, 238.

The doctrine that an action of waste could not be maintained against a tenant for life at common law, has been questioned by a learned writer, (*Reeves'* History i. 386. ii. 73, 74. 148. n.) on the authority of a passage in *Bracton; lib.* iv. c. 18. *fol.* 306. *b.* but it seems extremely doubtful whether that passage is inconsistent with the doctrine. The general expression *tenens ad vitam suam tantum,* may be understood, construing *secundum subjectam materiam*, of that particular class of tenants for life who were then subject to an action of waste; and it is evident that Lord *Coke* did not understand the words in their larger sense, since he repeatedly cites the passage as an authority for the disputed doctrine. An earlier chapter of *Bracton* contains a remarkable declaration of the right of a tenant for life to reasonable estovers, in contradistinction to waste, and the right of the owner of the inheritance to prevent the commission of waste, by personal interference.—"Et eodem modo si quis vastum fecerit vel distructionem in tenemento quod tenet ad vitam suam, in eo quod modum excedit et rationem, cum tantùm concedatur ei rationabile estoverium et non vastum, facit transgressionem. Et si talis impediatur per aliquem cujus interfuerit, sicut parens vel amicus, ille tenens assisam non habebit. Intentio enim talis liberabit a disseysina, quia in eo quod tenens abutitur male utendo, et debitum usum in modum debitum excedendo, non poterit dicere quod disseysitus est, quia tantum rationabilis usus ei conceditur. Et si per aliquod tempus fortè abusus fuerit ultra modum, talis seysina nulla erit, quia non est seysina quæ trahit ad abusum, sed præsumptio injuriosa. Et ideo causa et intentio liberat impedientem; sed hoc per assisam in modum juratæ captam declarari oportebit, scilicet utrùm sit ibi vastum vel rationabile estoverium. *Lib.* iv. c. 34. *fol.* 217 *a*.

The two following cases on the right of a tenant for life to timber, are extracted from Mr. *Merivale's* notes.

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of the acts may be understood to impose on him; and with this distinction too, that *White Knights* is granted, as

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WOLF *v.* HILL.

ROLLS. *July* 3. 1806.

Settlement of estates on trustees and their heirs, during the joint lives of *W. H.* and his wife, without impeachment of waste, upon trust, out of the rents and profits, to pay all expenses and outgoings, and to raise and pay a sum by way of pin-money to the wife, and subject thereto to pay the clear residue of the rents, &c. to *W. H.* during the lives of himself and his wife, remainder to *W. H.* for life, without impeachment of waste, remainder over; with power for the trustees to sell and lay out the produce in the purchase of other lands to the same uses; the land being sold under the power, *W. H.* was held entitled to the produce of timber cut down by him previous to the sale, not to the value of timber then standing.

By deeds, and fine, an estate was limited to the use of trustees and their heirs during the joint lives of *Walter Hill* and *Clarissa* his wife, without impeachment of waste, in trust that the said trustees shall and do, in the first place, by and out of the rents, issues, and profits of the said premises, which shall from time to time come to their or any of their hands, bear, pay, and defray, all expenses and repairs, and all taxes, charges, assessments, and outgoings, relating to the same, or any of them, and, in the next place, upon trust, after such deductions for repairs and other outgoings as aforesaid, by and out of the same rents, issues, and profits, during the joint lives of the said *Walter Hill* and *Clarissa* his wife, to raise the clear yearly sum of 80*l.* by way of pin-money, and pay the same to the separate use of the said *Clarissa Hill;* and, subject and without prejudice to the same yearly sum, to pay the clear residue and surplus of the same rents, issues, and profits, unto the said *Walter Hill* and his assigns, or to authorize and impower him and them to receive and take the same, during the natural lives of himself and the said *Clarissa* his wife, to and for his and their own use and benefit, with remainder to *Walter Hill* and his assigns for his life, without impeachment of waste, with remainders over.

Power to trustees to sell with consent of husband and wife. Money to be laid out in land to the same uses.

Hill built a house worth 3000*l.*, being an improvement, and cut down timber that sold for 270*l.* He and his wife then consented to sell, and the estate was sold. The timber standing was valued at 350*l.*

Alexander doubted his right to either.

A bill was filed, and his Honor was clear that *Hill* was entitled to the 270*l.*, and not to the 350*l.*

Alexander and *J. L. Williams*, for plaintiff.

Shadwell for defendant. (*a*)

(*a*) Countess of *Plymouth* v. *Archer*, 1 *Bro. C. C.* 159. 16 *Ves.* 180.

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as it is held, not subject to impeachment of waste. I think it due to the argument to say, that if the policy of

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1816. *June* 20—22. 1817. *Feb.* 28.

SIR SAMUEL EGERTON BRIDGES, PLAINTIFF;

AND

WILLIAM STEPHENS AND CAROLINE his Wife, DEFENDANTS.

Right of a tenant entitled to a life-interest, in a term of years, unimpeachable of waste, to fell timber for his own benefit.

By settlement made, 12th of *November*, 1785, on the marriage of the Reverend *Edward Timewell Bridges*, and the Defendant Mrs. *Stephens*, then *Caroline Fairfield*, spinster; reciting a mortgage of certain premises therein mentioned, dated the 10th of *February* 1720, for a term of 1000 years, without impeachment of waste, which had then become vested in *Jemima Bridges* and *William Hammond* as tenants in common; the said *Jemima Bridges* and *William Hammond* assigned to the Plaintiff, and another, one moiety of the premises for the then residue of the term, in trust (immediately from and after the solemnization of the marriage) for *Jemima Bridges*, for so many years of the term as she should happen to live, and after her death, in trust for *E. T. Bridges*, for so many years thereof as he should live, and after their respective deceases, in trust for the Defendant *Caroline*, for so many years thereof as she should live (*a*); and after the death of the survivor of the said *Jemima Bridges*, *E. T. Bridges*, and the said Defendant, then in trust for the children of the marriage as therein mentioned; and for want of such issue, in trust for the said *E. T. Bridges*, his executors, &c.

The marriage took place, but there was no issue, and *E. T. Bridges* died intestate in 1807, upon whose death his widow, the Defendant *Caroline*, took out administration, and by virtue thereof became entitled to the reversionary interest in the term expectant on the death of the survivor of herself and *Jemima Bridges*. On the 11th of *May* 1808, she offered this reversionary interest for sale in two lots, when the Plain-

(*a*) From the statement in the Registrar's book it seems that the settlement contained no express declaration that the successive life estates should not be subject to impeachment of waste.

tiff

of the acts raises no objection, much of the difficulty in my mind is removed.

None

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tiff became the purchaser for 2600*l.*, of lot 1., which was described in the particulars as " an undivided moiety of a valuable estate called *Denstead Wood*, &c. held under mortgage for the remainder of a term of 1000 years, commencing from the 10th of *February* 1720, but subject to the life-interest of two ladies, one in her 80th, the other in her 46th year;" paid the deposit, and signed a memorandum of agreement, whereby he acknowledged himself to have purchased the reversion of the said estate described as lot 1., and agreed to pay the remainder of his money and complete the purchase on having a good title.

In *Hilary* term 1809, the Defendant *Caroline* (the widow;) filed a bill for a specific performance. In 1811, *Jemima Bridges* died, whereupon she became entitled, as tenant for life in possession. In *October* 1812, she married the other Defendant, and on the 18th of *May* 1814, filed a bill of revivor and supplement, to which the Plaintiff had appeared and put in his answer but no decree had been made.

The present bill was afterwards filed by the Plaintiff, pending that suit, alledging that the premises of which he so became purchaser were almost all woodland, the value of which depended on the timber thereon, and that if the same were cut down, the land would be of very inconsiderable value, though, while it remained in its present state, the cutting of the underwood afforded a considerable profit to the tenant for life, but that the Defendants, insisting that, under the indenture of the 12th of *November* 1785, the defendant *Caroline* was unimpeachable of waste, and that the Defendants were entitled to cut down and fell timber at their pleasure, had actually felled, and threatened to fell, considerable quantities; therefore praying an injunction from felling, cutting, or grubbing up any timber or other trees, and from committing any other waste on the premises, and offering thereupon, and upon having a good title made, specifically to perform the agreement.

To this bill the Defendants put in an answer, insisting on their right to cut timber, and

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None of the previous annuitants are parties to this deed; and this, therefore, is not the intrument that can inform the Court who ought to be the receiver. If Mr.

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admitting that they had cut timber accordingly, but in a due and husbandlike manner, and according to the custom of the country.

A motion was now made on the part of the Defendants, to dissolve the injunction, which had been obtained previous to the coming in of the answer. (a)

Mr. *Bell* and Mr. *Treslove*, in support of the motion, cited *Speer* v. *Crawter*, 17 *Ves.* 216. *Chamberlaine* v. *Dummer*, 3 *Bro. C. C.* 549.

Sir *S. Romilly* and Mr. *Garratt*, for the Plaintiff, cited *Farrant* v. *Lee*, *Amb.* 105. (b), under the name of *Farrant* v. *Lovel*, 3 *Atk.* 723. *Perrot* v. *Perrot*, 3 *Atk.* 94. *Powlett* v. The *Duchess* of *Bolton*, 3 *Ves.* 374. *Wickham* v. *Wickham*, *Coop.* 288.

February 28, 1817. "His Lordship doth order, that the injunction granted in this case be dissolved; and his Lordship doth declare that the Defendant *Caroline Stephens*, who is entitled to a present interest for life in the estate comprised in the respective terms mentioned in the pleadings in this cause, is entitled, as between herself and the persons claiming in remainder, to cut down and apply for her own benefit, such timber as is fit and proper to be cut, in the course of a due and husbandlike management of the woods in question; and it is ordered that it be referred to Mr. *Thompson*, one, &c. to inquire what timber upon the premises in the pleadings mentioned, is now fit and proper to be cut and felled in the course of a due and husbandlike management of the said woods; and it is ordered that the said Master do state the same, with his opinion thereon, to the Court: and after the said Master shall have made his report, such further order shall be made as shall be just."

Reg. Lib. A. 1816. fol. 757.

(a) Injunction granted till answer or farther order, Reg. Lib. A. 1815. fol. 742.

(b) See 3 *Wooddeson Lect* 404. 6.

Withy

Withy is receiver under the deed, he will be bound to satisfy all the annuitants, according to the trusts of the deed; whereas if a receiver is appointed in the Master's Office, the Master will have the opportunity of declaring who should or should not be paid. A receiver under the deed, must act according to the terms of the deed; a receiver appointed by the Court, acts according to the determination of the Master on the priorities of the annuitants; and the fact that such a question is to be submitted to the Master, deserves regard, when we are considering whether a receiver should be appointed.

The covenants for title are not to be considered, in that view only, by a court of equity; because, when the Duke of *Marlborough* granted this charge on property, with respect to part of which, it was doubtful whether he could, and with respect to part clear, under the acts, that he could not, charge it, to make him enter into absolute covenants, as if he had been owner in fee simple, is a circumstance which a court of equity cannot overlook, considering the Duke's liability to answer in damages, the breach of these impossible engagements, and the extent of his previous incumbrances. If there had been an arrear of the annuity, *White Knights* might have been sold at the end of three months; a right of entry for perception of rents and profits accrues at the end of twenty-one days; after six months a receiver is to be appointed, not removeable; if he ceases to act another may be substituted, without the concurrence of the Duke, at an expense not exceeding one shilling in the pound, on the amount of receipts: if that means, on the rents of all the estates, the charge would be equal to five or six times the amount of the annuity which the deed was to secure.

It has been argued that in this case it cannot indeed be denied that the Duke has been dealing for his expectations,

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pectations, and is clothed with the character of an expectant heir; but that it is a present grant of an annuity, charged not immediately on estates in expectation, but in part on estates in possession.

The privilege of an expectant heir dealing substantially for his expectancy, not affected by the addition of a present possession or security.

The case has a singularity in that respect; but the grantor, appearing on the instrument, to be in the situation of an expectant heir, and in a situation in which his personal security is scarcely worth having, and the bulk of the securities being expectant property, I should certainly hesitate long before I lay it down as a principle, that if an heir apparent, dealing substantially for his expectations, is dealing also for a present obligation, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, he is not entitled to the protection given to heirs apparent, dealing for their expectations. Such a proposition would lead to most enormous mischief and go far to destroy the principle itself.

Under these circumstances, remembering on the one hand, the nature of the grant, and by whom it is made, and not forgetting on the other hand, that all parties are entitled to the utmost judicial consideration, it appears to me very doubtful whether I can support the receiver. Certainly, until the decree, I shall go no farther; but on that point I reserve final decision.

The Lord Chancellor.

April 29.

The ground of the first application was simply this, that the estates were in the hands of judgment creditors, and that the Plaintiff although he had an interest, which if it had been a legal estate, would have entitled him to eject

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eject those creditors, could not by proceeding at law, obtain possession, and therefore was in the ordinary situation of a creditor with an equitable security, applying to this Court in order to have execution, if I may use that word, given here; and if the case is clear, there is no doubt that the Court will, on motion, grant a receiver, without prejudice to prior incumbrancers. The circumstances of the principal part of this property with reference to the effect of certain acts of parliament, I certainly did not much take into consideration; because finding that judgment creditors were in possession of *Blenheim* House and *Woodstock* Park, I thought it extremely clear that if they could have execution, equitable creditors must be entitled to a remedy, against the property; on that point I shall say only that if this Court is ever to decide the question, whether, let the Duke of *Marlborough* have what right he may to the timber, his estate does not include all the incidents of a life estate with regard to other persons, that question should be addressed in the first instance to a court of law.

The ground of the application to discharge the receiver is quite distinct. Whatever may be the principle of the protection, if any, given to the *Blenheim* estate, I apprehend that it would not extend to *Marlborough* House and *White Knights*; for the reasons before assigned, I do not see how creditors can obtain the pension; but it is now contended, with regard to all the property, supposing it of the same nature, that the receiver ought not to be appointed before decree. The order for a receiver in this case does not rest on the same ground as the order in Doctor *Battine*'s case. There the application for a receiver was made by an annuitant; the receiver was appointed; Doctor *Battine* afterwards filed a bill, stating that the annuity deed was void,

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void, the memorial being defective, (I must take it for granted in this case that the memorial is good; since no objection has been suggested), and by the prayer of his bill, enabled the Court to say, what it could not otherwise have said, that the original purchase-money of the annuity was a lien on the estate, even if the annuity was void. (*a*)

(*a*) BAZZELGETTI *v.* BATTINE.
BATTINE *v.* BAZZELGETTI.

The bill in the first cause stated, a grant of an annuity in *July* 1796, by the plaintiff to the defendant, and an agreement that as soon as the defendant should become possessed of certain estates of which he was then in expectation, he should convey them for securing the payment of the annuity, and that the defendant had become entitled to the estates, and was in possession of them, but refused to complete the security, and concealed the particulars of the estates; a demurrer and plea having been overruled, the defendant filed an answer, admitting the annuity to be in arrear, and that by the death of his father in *Nov.* 1812, he became entitled to certain freehold estates, the particulars of which he set forth in a schedule, and submitting whether the plaintiff was entitled to the relief sought. A receiver having been appointed (Reg. Lib. A. 1815. *fol.* 901.) the defendant filed a cross bill, alleging that the grant of the annuity was void, and praying that upon payment of the price of the annuity and interest, after deduction of the past payments, the securities might be delivered up. Upon a motion by the plaintiff in the cross cause to discharge the receiver, the Lord Chancellor (4th *Feb.* 1818), expressed an opinion, that even admitting the validity of the objections to the annuity, the frame of Dr. *Battine's* bill, which prayed the delivery of the securities, not absolutely, but on terms of redemption, gave to the court a jurisdiction which it would not otherwise have had, and entitled the annuitant to continue the receiver on the estates, for the purpose of working out the payment.

On 19th *Feb.* 1821, these causes were heard before Chief Baron *Richards*, sitting for the Master of the Rolls, when the grant of the annuity was declared void, and the bill in the first cause dismissed.

It

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It has been decided here, first by Lord *Loughborough* that since courts of law have held (and I remember when it was a subject of great doubt,) that if an annuity is bad, the annuitant may recover what he paid, deducting what he has received, (*a*) though the principle of this Court is not to give relief to those who will not do equity, yet on a bill by the grantor to have an annuity deed delivered up as void under the statute, he is entitled to that relief without accounting for the consideration paid for the annuity, leaving the annuitant to proceed at law. (*b*) Doctor *Battine*, in the case to which I before

(*a*) *Shove* v. *Webb*, 1 *T. R.* 732. *Hicks* v. *Hicks*, 3 *East*, 12. *Scurfield* v. *Gowland*, 6 *East*, 241. *Waters* v. Sir *William Mansell*, 3 *Taunt.* 56.; and see *Stratton* v. *Rastall*, 2 *T. R.* 366., and 19 *Ves.* 132, 133. Criticisms on these judgments, by Lord *Eldon*, may be found in 7 *Ves.* 23.; 9 *Ves.* 492., and by Sir *James Mansfield*, in 1 *Taunt.* 522. Courts of law cannot order annuity deeds void under the statute to be delivered up; but they set aside the warrant of attorney and judgment, over which they possess a summary authority, *Dalmar* v. *Barnard*, 7 *T. R.* 248. *Appleby* v. *Smith*, 3 *Anstr.* 865. *Steadman* v. *Purchase*, 6 *T. R.* 737. *Ex parte Ansell*, 1 *Bos. & Pull.* 66. n.; and see *Crauford* v. *Caines*, 2 *H. Bl.* 438. 2 *Ves.* jun. 154. 7 *Ves.* 18. 10 *Ves.* 218.

(*b*) The principle of relief is, that the annuitant has no right to retain deeds which are void, but that the grantor is interested in obtaining the delivery of them, because though void, they may be used to his prejudice, and form, in the technical phrase, a cloud on his title. Being void for all purposes, the deeds cannot, as evidence of the contract under which they were executed, impose on the delivery terms of redemption, or create a lien on the property. The following are the leading cases from which the doctrine is to be collected.

Duke of *Bolton* v. *Williams*. 4 *Bro. C. C.* 297. 2 *Ves.* jun. 138. *Byne* v. *Vivian*, 5 *Ves.* 604. *Bromley* v. *Holland*, 7 *Ves.* 3. *Coop.* 9. *Jones* v. *Harris*, 9 *Ves.* 496. *Underhill* v. *Horwood*, 10 *Ves.* 218. *Ex parte Wright*, 19 *Ves.* 255. *Angel* v. *Hadden*, 2 *Mer.* 169. If the grantor, by his bill or answer,

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I before alluded, took himself out of that rule by his bill. The Duke of *Marlborough* has here by his answer, offered

answer, submits to account for the price paid by the annuity, the payments in respect of the annuity, will be set off: *Bromley* v. *Holland ubi supra*, *Hoffman* v. *Cooke*, 5 *Ves*. 623. If those payments exceed the amount of the price of the annuity with interest, the grantee must refund the balance. *Byne* v. *Vivian*, 5 *Ves*. 604. *Holbrook* v. *Sharpey*, 19 *Ves*. 131., but see 7 *Ves*. 24.

On the general jurisdiction of courts of equity to compel the delivery of void instruments, which has been the subject of contradictory opinions, and even decisions, see, in addition to the preceding cases, *Ryan* v. *Mackmath*, 3 *Bro. C. C.* 15. *Pierce* v. *Webb*, 3 *Bro. C. C. ed. Belt*, 16 n. *Newman* v. *Milner*, 2 *Ves*. jun. 483. *Franco* v. *Bolton*, 3 *Ves*. 368. (with the criticism of Lord *Eldon*, 7 *Ves*. 19.) *Mason* v. *Gardner*, 4 *Bro. C. C.* 436. *Sowerby* v. *Warder*, 2 *Cox*. 264. *Scott* v. *Nesbit*, 2 *Bro. C. C.* 640. 2 *Cox*. 183. *Lisle* v *Liddel*, 3 *Anstr*. 649. *Duff* v. *Atkinson*, 8 *Ves*. 577. *Jackman* v. *Mitchell*, 13 *Ves*. 581. *Hayward* v. *Dimsdale*, 17 *Ves*. 111. *Jones* v. *Frost*, 3 *Madd*. 1 *Redesdale* on Pleadings, 104. n. c. 13 *Ves*. 298. 1 *V.* and *B*. 244. *Ex parte Scrivener*, 3 *Ves*. and *Bea*, 14.

In *Bromley* v. *Holland*, Lord *Eldon* remarks, that "in the case of *Hanington* v. *Du Chastel*, where Lord *Thurlow* granted an injunction against a bond for the purchase of an office, taking notice of the alteration of the law of pleading, he is made to intimate, that the jurisdiction of this court might not be necessary, if the defence could be made at law. That I take to be a mistake; for I am quite sure, Lord *Thurlow's* opinion was, that courts of law, properly, if you please, taking upon themselves to do that by new forms of pleading, which they had never before done, as dispensing with *profert*, or permitting the averment of a consideration not in the body of the deed, could not destroy the ancient jurisdiction of this court in matters of that nature. That unquestionably was his opinion." 7 *Ves*. 19. Mr. *Vesey* refers to *Atkinson* v. *Leonard*, 3 *Bro. C. C.* 218. The following account of *Hanington* v. *Du Chastel*, (of which the printed reports, 1 *Bro. C. C.* 124.

offered to take the account on the basis of payment and receipt; but I wish to see the answer in order to know whether

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C. C. 124. 2 *Dick.* 581. 3 *Wooddeson, sect* 459. n. are extremely imperfect,) is extracted from a manuscript in the possession of the Editor.

In chancery, *Michaelmas* term, 1781. In 1760, *J. Hanington* was house-stewaad to the late Earl of *Rochford*, who was at that time groom of the stole to King *George* 2d.; the place of one of the pages of the back stairs, which place was in the appointment or recommendation of the Earl, as groom of the stole, becoming vacant, the Earl, being desirous of providing for *Jean St. Feriol*, who was a foreigner, and therefore incapable of holding the place, but who had been tutor to the Earl, entered into an agreement with *J. Hanington* to give the place to him upon condition, (amongst other things) of his securing an annuity of 100*l.* to *St. Feriol;* accordingly *J. H.* executed a bond, dated 10th *June*, 1760, in the penalty of 600*l.*, conditioned for the payment of an annuity of 100*l.* to *St. Feriol*, provided *J. H.* should enjoy the place during the life of *St. Feriol*, but if the place should be taken away then to be void. *J. H.* had the place, and for some time paid the annuity to *St. Feriol*, who died 16th *May*, 1776, leaving defendant *Du Chastel* his executor. The defendant having brought an action, and obtained a verdict against *J. H.* on the bond for the arrears of the annuity due at the death of *St. Feriol*, this bill was filed by *J. H.* against *Du Chastel*, praying that the bond might be declared void, and be delivered up to be cancelled, and an injunction to stay execution at law.

On motion to dissolve the injunction, it was contended on the part of the Plaintiff, that this was a proper subject for the interference of a court of equity. The profits of the place were not sufficient, or more than sufficient, to pay the several annuities; but, independent of that circumstance, this court will set aside this sort of contract upon general political principles. In this case a court of law could not relieve; Lord *Rochford* not being the obligee of the bond, the case did not come within the st. of

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whether he has so submitted as to make the price of the annuity a charge on the estate or only a personal charge

5 & 6 *Ed.* 6th c. 16. The cases cited were *Law* v. *Law, Forrester,* 140. (*a*) *Gray* v. *Hesketh, Burn*'s Ecc. law (*b*), *Debenham* v. *Ox,* 1 *Vezey,* 276. *Godolphin* v. *Tudor, Salk.* 468. *Rex* v. *Vaughan, Hawk. P. C.* 168. Sir *Thomas Raymond,* 400. (*c*)

On the part of the Defendants, it was argued; that this matter was not proper for a court of equity; the whole transaction might have been set out upon plea; this court never gives relief for mispleading at law. If this was *turpis contractus,* a court of law would relieve. It does not come under any of the heads of which a court of equity takes cognizance, namely, fraud, trust, accident, and account. A distinction was also taken by *Graham,* between offices of a public nature, and offices relating to the king in his private capacity; and he argued that the office of a page of the back stairs being of the latter kind, it was not within the mischief intended to be prevented by st. *Ed.* 6th, and that the bond was not objectionable on political principles.

The Lord *Chancellor.* Here are two questions. 1. Whether this contract is to be relieved? 2. Where? As to the first, it matters not whether the office be of a public or private nature. It may be equally contrary to the policy of the law. It is a public concern that private injuries should be redressed. This is the foundation of the decision in this court between guardians and wards. The multiplying private injuries makes them public. If a private manager of an estate enter into an agreement, and thereby break trust with his master, the agreement is corrupt. I think, therefore, that no distinction can be made between public and private servants. Besides which, the law has not said, that the grooms, pages, &c. about the king, are merely menial servants. On the contrary they are entitled to

(*a*) 3 *P. W.* 391.

(*b*) Vol. 3. p. 354—356

(*c*) The reference is incorrect. 4 *Burr.* 2494.

charge on himself; and I reserve my opinion on the other parts of the case till I have seen the answer; because,

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Distinction between *malum in se* and *malum prohibitum* not admitted.

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to privilege, and therefore clearly distinguished from private servants. This contract is therefore to be relieved.

Secondly, Where? This Court does not apply equity to a case within the province of a court of law; but the jurisdiction of the courts of law has not always been clearly ascertained. The case of *Dowing* v. *Chapman* was then considered as a doubtful case. This case comes clearly under the head of fraud. I cannot refuse relief in this Court in a case which has never been relieved in a court of law, though I think it would be relieved there; many cases would be wrong if relief was to be refused under that circumstance. Injunction granted.

Feb. 5. 1783. The cause came on to be heard.(*a*) Lord *Chancellor, First*, Can a Plaintiff come into a court of equity, and recover a bond which he had entered into under these circumstances? There has been some difference of opinion on the subject; but I profess I cannot admit the distinction between *malum prohibitum* and *malum in se*, when applied to a contract in a country where the laws have prohibited the thing contracted to be done. The obligation to abide by the laws of the land is part of the duty of a citizen, and therefore I cannot see the difference. (*b*) It is impossible to bring the cases to any other point than this; that the encouragement of the contract is contrary to the good of the public, as prescribed by law; and therefore the good of the public requires to put an end to such contract, otherwise it would be an unequivocal declaration of law that the party shall have all the benefit of the contract; for the law approves what it refuses to rescind, and this must be the fundamental principle of all the cases, that it is a transaction on a foundation which ought not to have been the basis of a civil contract. If so, this is a proper place for relief. *Secondly*, Whether this

(*a*) *Reg. Lib.* A. 1782. fol. 260.

(*b*) See *Cannan* v. *Bryce*, 3 *Barn. & Ald.* 183.

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cause, if the submission authorises me to fix the price as a charge on the estate, no objection can arise to

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is *turpis causa?* I will not allow myself to go into invective upon the present occasion. Lord *Rochford* might have been led into an error; he had many very valuable and amiable qualities; indeed there are many reasons to prevent my speaking severely on this occasion. As to what has been said on the statute of 5 & 6 *Edw.* 6., it goes more to a legislative than a judicial proceeding. When the law is made, it is no more a subject of inquiry whether what the law has ordained is proper or not; nor need I go into the nature of offices; — but what I am to determine upon merely is, whether if one person be authorised to recommend or appoint another person to an office, under a third person, he can, without the privity of the third person, and for a private consideration of his own, recommend or appoint such other person to such office? Between private persons, I should think it would be a breach of the confidence reposed on him. But I do not mean to leave a service about the crown in the same situation as a private service. The laws have never considered the servants about the crown, whether menial or other, as private persons. Here, then, we must consider expressly the case of servants about the crown. It does not now seem to be contended that the bond would have been good, if it had been given to Lord *Rochford* himself: now, if the contract itself was wrong, how can I make the difference? The danger of making the distinction is great. It would perhaps have made the point stronger, and it would have looked more ugly; but taking it as a dry maxim, or as to the policy of the law, it becomes the same thing. Therefore, the injunction must be perpetual.

In addition to the authorities referred to on the former occasion, were cited, *Co. Litt.* 234. a. *Lawrence* v. *Brasier*, 1 *Cha. Ca.* 72. *Berrisford* v. *Done*, 1 *Vern.* 98. *Symonds* v. *Gibson*, 2 *Vern.* 308. *Blankland* v. *Debby*, Ch. Just. *Holt.* (*a*)

(*a*) Probably *Blankard* v. *Galdy*, *Rep. Temp. Holt*, 341. 4 *Mod.* 222. *Salk.* 411. *Comb.* 228.

suffering

suffering the estate to remain in the hands of the receiver, till the demand so shaped has been satisfied. If the submission does not charge the estate, the question will be, whether this deed is so oppressive that a court of equity will not, in the first instance, interfere in its aid? It is now the practice of every day, to appoint a receiver on motion; but that practice may not be applied where there is fair matter of doubt, having regard to the fact that the grantor is within the privilege attending the character of heir expectant, (as to which age makes no difference) and having regard to the comprehension of the deed with respect to the subjects of the grant, and to all its provisions, whether the deed may not be considered, as in its nature so oppressive, that, aided by the policy which belongs to heirs expectant, the Court should not in the first instance say, that if the Plaintiff is to have execution, it must be by decree. I am aware that during my whole time considerable doubt has been entertained, whether that policy with regard to expectant heirs, ought to have been adopted; and although Lord *Thurlow* repeatedly laid it down, that this Court does shield heirs expectant to the extent of declaring a bargain oppressive in their case, which would not be so in other cases, and imposes an obligation on the parties dealing with them to show that the bargain was fair, yet he seldom applied that doctrine without complaining that he was deserting the principle itself, because the parties dealing with the heir expectant insured themselves against that practice, and therefore the heir made a worse bargain; but he certainly, like his predecessors, adhered to the doctrine, though not very ancient. It is not the duty of a Judge in equity to vary rules, or to say that rules are not to be considered as fully settled here as in a court of law.

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I desire to be understood as expressing no opinion with respect to the incidents belonging to the estate of the Duke of *Marlborough*, or his right to fell timber; but confine myself simply to the question, whether, if this were the property of any other heir expectant, the Court would, in the present stage of the cause, grant a receiver.

May 27.

On this day the question was argued whether the grant of the annuity was void under the annuity-act. (*a*)

Mr. *Wray* and Mr. *Hampson* for the Duke of *Marlborough*.

The memorial is insufficient in not specifying the amount deducted from the consideration, for the costs of preparing the securities. The policy of the act requires that the amount actually received shall appear on the memorial. *Bolton* v. *Williams* (*b*), *Fenner* v. *Evans* (*c*), *Broomhead* v. *Eyre*. (*d*) The retainer of these expenses in exoneration of the grantee, is a part of the original agreement for the grant of the annuity, and therefore a deduction from the actual amount of the consideration, not an application of the consideration in payment of a pre-existing debt: in that respect this case is distinguishable from *Monys* v. *Leake*. (*e*)

Mr. *Hart* for the plaintiff.

The principle on which Lord *Rosslyn* decided the Duke of *Bolton* v. *Williams* was, that, *primâ facie*, the

(*a*) 17 *Geo.* 3. c. 26.

(*b*) 2 *Ves.* jun. 138. 4 *Bro. C. C.* 297.

(*c*) 1 *T. R.* 267.

(*d*) 5 *T. R.* 597.

(*e*) 8 *T. R.* 411.

purchaser

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purchaser was bound to pay the expense of preparing the deeds, as the securities of his title; and that payment by the grantor was an effectual deduction from the price of the annuity. The soundness of that principle is questionable; the expense of mortgages is always defrayed by the mortgagor. *Monys* v. *Leake* decides this case in terms.

The LORD CHANCELLOR.

The last case seems to me decisive of the present, if an affidavit can be made that the Duke received the whole consideration money. Lord *Kenyon*'s earlier decisions followed Lord *Loughborough*'s first decision; and I believe that, as has been suggested, Lord *Loughborough* had a notion that the grantee ought to pay the expenses. The latter decision of Lord *Kenyon*, who seems desirous to retreat from his former doctrine, proceeds expressly on this fact, that the whole money was paid to the grantor, and that out of it he paid the expenses of preparing the securities, as expenses of his annuity; but Lord *Kenyon*'s reasoning does not proceed to this extent, that if payment of the difference only, deducting the charge, had been made, he would have supported that; though I do not see how he could have stopped.

The LORD CHANCELLOR.

The principle on which the Court appoints a receiver *June* 10
I may state to be this, that where a plaintiff, in his bill, represents that he has only an equitable estate, which, consequently, does not entitle him to recover at law, if it be clear that he has that equitable estate, on which he may recover in equity, the Court will appoint a receiver, not disturbing prior beneficial interests. It is now insisted that the receiver should be discharged, on the

 ground

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ground that this deed is such as a court of equity will not enforce: not by decree on hearing; *à fortiori* not on motion. The validity of the memorial is also questioned; and it is clear that, without a good memorial, this deed, as an annuity-deed, would be void; the rule of the Court being settled that such a deed, if not good as an annuity-deed, gives no lien on the estate for the price paid for the annuity, although that may be recovered at law, accounting for what has been received. (*a*)

Relief against an oppressive deed, though obtained from an heir apparent, is given only on payment of the consideration with interest.

The case therefore resolves itself into these questions, whether the memorial is good? and if it is, whether this deed is so oppressive in its nature, that the Court will not act on it? I think that the objections to the memorial cannot be sustained. I must, therefore, take this to be a valid annuity-deed, and the question is, will this Court refuse to act on it, considering it as an oppressive deed, and recollecting that the Duke executed it in the situation of an heir apparent dealing for his expectations? It strikes me as, in some instances, extremely oppressive, but then we return exactly to the same result. No one can come into a court of equity, to be relieved against an oppressive deed, even in the character of heir apparent dealing for his expectations, except on tender of the purchase-money and interest; and when the Duke attacks this deed, not as invalid under the annuity-act, but as evidence of a bargain which ought not to have been made with an heir apparent, he cannot be heard on any other terms. The consequence is, that till that amount is offered, and either accepted or refused, the question whether the receiver shall be discharged is premature.

(*a*) Duke of *Bolton* v. *Williams*, 2 *Ves.* jun. 142. 156. *Jones* v. *Harris*, 9 *Ves.* 496. *Ex parte*, *Wright*, 19 *Ves.* 255. *Angell* v. *Hadden*, 2 *Merr.* 169. *Vide ante*, p. 157.

mature. To the extent of that amount, considering this as a mere deed, not as an annuity-deed, I think there is a lien.

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August 5.

A tender of the amount due to the Plaintiff having been accepted, the judgment of the Court was now prayed.

The Lord Chancellor.

I am of opinion that the receiver must be discharged. If the Duke had tendered, and the Plaintiff refused to accept, what would be found due on an account taken of the accruing payments of the annuity on one side, and the price and interest on the other, I think that would authorise me to discharge the receiver.

Mr. *Hart* asked for costs, but the Lord *Chancellor* refused them.

August 9.

Mr. *Tinney* for three Defendants, creditors of the Duke, applied to be heard against the order for discharging the receiver, insisting that two of the Defendants had annuities prior to the Plaintiff's, and were, therefore, more entitled than the Plaintiff in the appointment of a receiver; that they had also the legal estate, of the advantage of which they had been deprived by the order for a receiver, and as a substitute, they were entitled to the benefit of that order; that the direction to the Master to state priorities, was founded on the prayer of the bill: at least that the Defendants were entitled to a like tender with the Plaintiff.

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The order for a receiver obtained by the plaintiff discharged on payment of the sum due to him, although defendants, prior incumbrancers, opposed the discharge.

The LORD CHANCELLOR.

I apprehend that with the right of the Plaintiff to have the receiver, must fall the rights of the other parties. It would be most extraordinary, if, because a receiver has been appointed on behalf of the Plaintiff, any Defendant is entitled to have a receiver appointed on his behalf. My decided opinion is, that the order for a receiver must be discharged, and that all falls together. The Defendants may file a bill, but the appointment of a receiver would not have affected their legal estate.

The order, dated the 9th of *August*, 1819, after stating the substance of the bill, the order of the 5th of *March*, 1818, the suggestion in the answer of the Duke of the invalidity of the annuity, and the offer to pay what remained due to the Plaintiff, proceeded thus; "That it appears by the affidavit of *R. Broome*, that he called at the house of Mr. *R. Withy*, the solicitor for the Plaintiff in this cause, on the 19th day of *June*, 1819, and tendered to him the sum of 600*l.* in bank of *England* notes, in satisfaction of what remained due to the said Plaintiff, in pursuance of the offer made by the said Defendant in his answer to the Plaintiff's bill filed in this cause, which he the said *R. B.* believes, reckoning interest at 5*l. per cent.* up to the 21st day of *June*, 1819, amounted to 572*l.* 17*s.* 3*d.*, and that after some conversation with the said *R. B.*, in which he the said *R. B.* insisted that such tender was made upon the terms before mentioned, the said *R. W.* accepted the said sum of 600*l.* It was therefore prayed that the bill filed in this cause, may be dismissed upon such terms as to costs, to be taxed by the Master, as this Court shall direct: or otherwise, that the sum of 600*l.*

 paid

paid to and accepted by the solicitor on the 19th day of *June* last, be returned to the said Defendant, or his solicitor, with interest thereon, from the time the Plaintiff received the same, up to the time of repayment, at and after the rate of 5*l.* *per centum per annum.* Whereupon, and upon hearing, &c., His Lordship doth order, that the order bearing date the 5th day of *March*, 1818, appointing *E. R. Mores* receiver of the rents and profits of the estates in question in this cause, be discharged."

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(Reg. Lib. A. 1818. fol. 1939.)

Nov. 12.

Mr. *Hart*, for the Plaintiff, proposed to vary the order discharging the receiver, by inserting a declaration, that the sum tendered by the Duke was accepted, without prejudice to any question between the parties.

Mr. *Wray* for the Duke, insisted that the sum must be understood to be accepted, as it was tendered by the answer, in satisfaction of the Plaintiff's claim.

The LORD CHANCELLOR.

I can make no declaration that the money was received without prejudice, though it was my intention to have said something on that subject. I meant that the receipt should, in this sense, be without prejudice, namely, that the receipt should itself be a fact, which would on the hearing raise a question in the cause, which would not have arisen if the receipt had not passed. I did not mean that the fact of the receipt should not be considered, when the merits of the case came to be discussed on the hearing. I have no objection to the Plaintiff's repaying the money, and reinstating the cause in precisely the same situation as before

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before the receipt, the receiver being restored, subject to the question whether he should be continued. The receiver must have his costs.

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16 *Nov.*
29 *Car.* 2.
1677.

SKELTON v. SKELTON. (a)

The bill was exhibited against a jointress to stay *maresme* in felling timber, and notwithstanding the defendant's answer, who claimed the inheritance by a deed which the plaintiff controverted, an injunction was obtained until hearing; and now, at the hearing, she proved herself to be a jointress in tail; and it was urged by Mr. *Attorney*, that the defendant being a jointress within the statute of 11 *H.* 7., which restrains all power of alienation by fine or discontinuance, she ought likewise to be restrained in equity from committing waste, which is also in disherison of the heir. But this I would by no means allow, that equity should enlarge the restraints or the disabilities introduced by act of parliament; and as to the granting of injunctions to stay waste, I took a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If the tenant have only a bare indemnity, or exemption from an action if he committed waste, there it is fit he should be restrained by injunction from committing it; but if he have a right in the thing itself, when it is wasted and cut down, there it is no way reasonable that he should be restrained: as, for example, if there be tenant for life, the remainder for life, the reversion in fee; here the tenant for life has no right nor power to fell timber or commit waste; yet if he do so he cannot be punished for it in an action of waste, during the life of him in the remainder for life; for that intervening remainder is an impediment to the action; so it is most just to grant an injunction to stay waste; and so it was ruled in the Chancery by advice of judges, *P.* 41 *El.* Sir *F. Moor*, 554. *pl.* 748.; and *Egerton*, *C.* said he had seen a precedent of such an injunction, 5 *R.* 2., and so it had been done before, *temp. E.* 6. *Vandemot* v. *Eyr:* and with this

(a) *Vide ante*, p. 147. n.

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this agrees 16 *Jac. B. R.*, 1 *Roll.* 377. *pl.* 13. *per curiam.* And the reason of this is most convincing; for when such a tenant for life hath cut down the trees, he in the remainder in fee may take them away, notwithstanding the mean remainder for life, or he may have a trover and conversion against the tenant for life, if he remove them; which shows that such tenant for life hath no property in the trees; it were, *ergo*, most absurd to put the reversioner to recover damages for his inheritance in the trees, or to seize them as chattels, when they may better be preserved to him in specie, by granting an injunction to stay the felling of them. And upon the like reason it may seem that tenant after possibility may be restrained by injunction from committing waste, for so if he fell trees the reversioner may have a trover and conversion, as was held 24 *Car.* 1. *B. R. Udal* v. *Udal*'s case, *p. Rolle et curiam;* and yet *temp. E. R. placita parliament. Ryley, Appendix,* 653. *Kirbrok* petitions "*quod breve de waste poet giser versus Roger son frere*" (against *Maud,* the widow of *Roger*) "tenant in tail, *apres possibilité; Response, ley nest mye uncore ordein en ce cas.*" Probably this was before 21 *Ed.* 3., for in 21 *Ed.* 3. *Rot. Parl.* n. 46., the commons petition for a general law, that tenant after possibility might be liable to an action of waste, as being in effect but tenant for life, yet could not obtain it; but this serves only to keep the tenant after possibility in a state of impunity, if he commit waste, not to give him a right to commit it. On the other side, if there be tenant for life, with an express charge to hold without impeachment of waste, he is not to be restrained by injunction, for he hath more than a bare impunity, viz. a right in the trees to fell them; *à fortiori*, in the case in question, no restraint can be put upon a jointress in tail who hath the inheritance; and yet all this notwithstanding, he that hath a lawful power and liberty to commit waste may be restrained by Chancery from using this power, when the waste which he is about to do is signally *contra bonum publicum.* V. 19 *Car.* 1. *B. R.* 1 *Roll.* 380. T. 3., though a lease for years was made without impeachment of waste by the Bishop of *Winchester*, yet when the lessee for years, towards the end of his term, was about to cut up all the trees, an injunction was awarded by the advice of all the Judges, *pro bono publico*, and in favour of the church,

whereof

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whereof the King is patron, notwithstanding the agreement of the parties. But in my Lord of *Orford's* case, where the Earl was tenant for life without impeachment of waste, the reversion in fee to the co-heirs of the Lady *Banning*, and the Earl was about to pull down a house near *Colchester*, no injunction could be obtained, but the co-heirs and Sergeant *Peck*, who was a purchaser from one of them, were fain to compound with the Earl. So it seems there is some discretionary latitude in these cases; but that which is more remarkable is, that he who hath a power to commit waste may sometimes be restrained from the exercise of that power, when it tends only to a private damage; as for example, the Lady *Evelyn* was tenant for life in jointure, remainder to Sir *John Evelyn*, her eldest son, for life, without impeachment of waste, with several remainders over; the jointress let the land to a tenant at will; Sir *John Evelyn* enters by consent of the undertenant, and cuts down trees; resolved, though no injunction had lain against Sir *John Evelyn* if his remainder had fallen into possession, yet now it does; for although the licence of tenant at will to enter excuse the entry from being a trespass, yet no possession by such entry can enable him to cut down the trees presently, for the jointress hath right during her life to the shade and the mast; and to reasonable bootes; *ideoque* Lord *Bridgman, Custos*, awarded an injunction during the life of the jointress. 1 *Dec.* 1670. 22 *Car.* 2. Lord *Nottingham's* MSS. "This court sees no colour of cause to give the said plaintiff any relief in this court,' and doth therefore think fit and order that the matter of the said plaintiff's bill be from henceforth clearly and absolutely dismissed out of this court; and it is hereby referred to Sir *J. F.* &c. to tax the said defendants their moderate costs of this suit." Reg. Lib. B. 1677. fol. 33.

ABRAHALL *v.* BUBB.

1 *July*, 31 *Car.* 2. 1679.

The bill supposed the defendant's wife to be tenant in tail after possibility, by the provision of a former husband, and prayed she might be restrained from committing waste; the defendant demurred; yet I ordered him presently to answer *quoad* the house and trees about it, *pro bono publico;* but the next morning I ordered him to answer

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27 *May*,
32 *Car.* 2.
1680.

answer the whole bill, upon the reason of the case, *Skelton* v. *Skelton*, because tenant after possibility has only *impunitatem*, not *jus in arboribus*, for he in reversion may have a trover when they are felled.

The importunity of the parties being great, I restrained only mischievous waste, which might deface the seat, but gave way that trees marked out by the ancestor for payment of his debts might be felled; yet I continued in the same opinion, that where he in the reversion might have a trover for the trees when felled, there the court ought to grant an injunction to stay the felling, and that I took to be this case; and I observed that the opinion that tenant after possibility is dispunishable of waste, was an addition to Mr. *Littleton*, and no part of the original text; but, however, it is one thing to have impunity, and another to claim right in the trees; the very act of the party who grants an estate without impeachment of waste, has not always been understood to transfer a property in the trees, as may appear by *Herlakenden*'s case; and so at this day, the usual form of conveyances is, after the words without impeachment of waste, to add a clause, and with full power and authority to do and to commit waste, which shows that this is taken to be somewhat more than the former words do necessarily imply; and the case is put in my Lord *Dyer*, where an estate without impeachment of waste was granted upon condition not to commit voluntary waste, and held to be a good condition, and consistent with the grant. If the act of the party be so tenderly construed to prevent waste, the act of the law ought to be bounded with more circumspection. But hereafter, when any such case shall happen again, it may be fit to direct that a trover and conversion be brought for felling some oaks, which shall be admitted to be cut; and as the law shall be judged in a trover, accordingly to grant or deny a perpetual injunction, and in the mean time to stay waste. Lord *Nottingham*'s MSS.

1818.

Rolls.
July 4.

RICHARD CUDDINGTON, Plaintiff.

ROBERT WITHY, JOHN DYMOKE, Clerk, ANN OSBORN, RICHARD OSBORN, GEORGE Lord Bishop of LINCOLN, and THOMAS HENRY EWBANK, - - Defendants.

A sequestrator being in possession of a rectory, under a sequestration issued by a creditor of the rector, a second creditor having obtained a subsequent sequestration, is entitled to an account in equity against the first sequestrator, and payment of the surplus after satisfaction of the first creditor; nor are prior incumbrancers who have not obtained sequestration necessary parties to the suit.

THE bill stated, that *Dymoke* being indebted to the Plaintiff in the sum of 181*l.* 12*s.* for goods sold, gave a bill of exchange, accepted by *Thomas Banks*, for that sum, which not being paid, the Plaintiff brought an action against *Dymoke* and *Banks*, which was compromised on their executing a warrant of an attorney, dated the 23d of *November* 1811, authorising judgment to be entered against them, or either of them, for 600*l.*, with a defeasance indorsed, declaring that the warrant of attorney was given for securing payment to the Plaintiff of 297*l.* (being the amount of the principal of the debt and interest, and the costs of the action,) with interest and costs, *&c.*; that payment not being made on the 30th of *April* 1812, the Plaintiff caused judgment to be entered up against *Dymoke* and *Banks*, and a writ of *fieri facias* to be issued against *Dymoke*, indorsed to levy 307*l.* 4*s.* 2*d.*; that the sheriff made a return that *Dymoke* was a beneficed clerk, having no lay fee, nor any goods nor chattels in his bailiwick, whereof he could cause the debt or damages to be levied, but was the rector of certain rectories in the county of *Lincoln*, having glebe and glebe lands and tithes belonging thereto of great value; that upon the return made by the sheriff, the Plaintiff obtained from the Defendant, the Bishop of *Lincoln*, a writ of sequestration, dated the 10th of *July* 1812, authorising and requiring certain persons named by the Plaintiff, to sequester the fruits, tithes, *&c.* of the rectories, and to

16 render

render a true account, *&c.* when required, but subject and without prejudice to two former sequestrations, granted on the 26th of *November* 1811, the Plaintiff, together with a surety, entering into a bond in the penalty of 1200*l.* to the Bishop, for faithfully collecting and accounting, *&c.* and causing the cures of the churches to be duly supplied in divine offices and other requisites; that the two former sequestrations were issued, one at the suit of the Defendant *Ann Osborn* to levy 126*l.*, and the other at the suit of the Defendant *Richard Osborn* to levy 89*l.*, and were respectively directed to the Defendant *Robert Withy*, as the sequestrator; that *Withy* entered on the rectories, and into the receipt of the tithes and emoluments, and had ever since continued in possession; and that the whole debt remained due to the Plaintiff.

The bill prayed, an account of what was due to the Defendants *Ann Osborn* and *Richard Osborn* for principal, interest, and expenses of the writs of sequestration, and of the tithes and profits of the rectories received by the Defendant *Withy* as such sequestrator, or by his order, *&c.*, and of the application thereof; and that the surplus of the money so received, after satisfying the prior sequestrations, or a competent part of such money, might be paid to the Plaintiff, in satisfaction of his debt, or that the writs of sequestration of *November* 1811, might be discharged, and that the Plaintiff or his sequestrator might be let into the possession or receipt of the tithes or profits of the rectories.

Ann Osborn and *Richard Osborn*, by their answer, stated, that the sequestrations of the 26th of *November* 1811, were issued not for the purpose of levying the sums mentioned in the bill, but to levy the whole of the fruits, tithes, *&c.* of the rectories, and, after supplying the

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the cures with divine offices, *&c.*, to account for the surplus to the Bishop of *Lincoln;* that by two indentures of the 7th of *December* 1808, *Dymoke* granted to *Ann Osborn*, in consideration of 700*l.*, an annuity of 126*l.*, and to *Richard Osborn*, in consideration of 494*l.*, an annuity of 89*l.*, both annuities being charged upon the rectories, *&c.*, and payable during the joint lives of *Dymoke* and *T. C. B.*, and *Dymoke* executed two warrants of attorney to confess judgment for 1400*l.* and 988*l.* respectively; that the annuities being in arrear, the Defendants caused the two sequestrations to be issued, and *Withy*, as their agent, was appointed sequestrator; and *Withy* and the Defendants executed bonds to the Bishop of *Lincoln*, conditioned for *Withy* duly collecting and accounting; admitted that *Withy* collected considerable sums, but not more than sufficient, as the Defendants believed, to pay the sums for which the writs of sequestration issued, or, at least, other incumbrances prior to the date of the Plaintiff's; and submitted that if there were any surplus, after payment of the annuities to the Defendants, and the prior incumbrances, the Defendants and *Withy* were required by their bonds to account for the same to the Bishop of *Lincoln*, or his Vicar-General on his behalf. Their answer also stated proceedings in two suits instituted by *Dymoke* against them respectively, to impeach their security.

Withy's answer was to the same effect; and, stating that he was merely a trustee, submitted that the prior incumbrancers, the annual demands of whom exceeded the annual value of the livings, were necessary parties.

The Bishop of *Lincoln*, admitting the sequestrations, professed to be a stranger to the other matters in question, and hoped that the Court would give proper order for the supply of the churches in divine offices, *&c.*

Sir

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Sir *Samuel Romilly* and Mr. *Roupel* for the Plaintiff.

The Plaintiff, a judgment creditor who has obtained sequestration, is entitled to an account of the surplus in the hands of the prior sequestrator, after satisfaction of the arrears and growing payments due to the creditors who obtained the first sequestration. The prior incumbrancers (supposing their incumbrances proved in the cause) who have not made their claim effectual against the estate, are not entitled to a preference over subsequent incumbrancers issuing sequestration. Some of the alleged incumbrancers are anterior to those of the *Osborns*; and if the objection is valid, the sequestrator has not been justified in applying his receipts to the discharge of their annuities.

Mr. *Hart* and Mr. *Seton* for the Defendants.

After the purpose of the first sequestration is satisfied, the subsequent creditor must apply in the bishop's court for an account against the sequestrator. In its legal sense, the first sequestration, authorising a levy to the amount for which judgment has been confessed, is not satisfied. A creditor seeking equitable relief against property subject to specific incumbrances, can obtain it only on the principle of redemption. The sequestrator submits whether the Court can authorise payment to the Plaintiff in the absence of prior incumbrancers, and without affording to them an opportunity to assert their rights.

The MASTER *of the* ROLLS.

I apprehend that this fund must be paid among the persons who have taken out sequestration; the Court knows not the existence of incumbrances which the parties have not followed with execution, and made

 avail-

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available. The surplus in the hands of the sequestrator would, before the second sequestration, have been payable to *Dymoke.* The incumbrances are not proved in the cause; supposing their existence, the creditors have not rendered their securities effectual. Are they to stand by and protect the surplus for ever, not taking it themselves, but preventing its being paid to all those who have used due diligence? I presume that the churches are provided for under the original sequestration; that is always a primary object. The Plaintiff is entitled to an account against the sequestrator.

His Honor doth order and decree, that it be referred to Sir *John Simeon,* Baronet, one, &c. to take an account of what is due to the Defendants, *Ann Osborn* and *Richard Osborn,* for the arrears of the annuity payable to them in the pleadings mentioned, and the costs and expenses of the two writs of sequestration issued by them, as in the bill stated; and it is ordered, that the said Master do also take an account of the tithes, rents, and profits of the rectories in the pleadings mentioned, come to the hands of the Defendant *Robert Withy,* as such sequestrator as aforesaid, or to the hands of any other person or persons by his order, or for his use, and of the application thereof; and it is ordered, that the said Master do also take an account of the principal and interest due to the Plaintiff, upon the judgment obtained by him against the Defendant *John Dymoke,* in the bill mentioned, and the costs due to the Plaintiff upon the writ of sequestration issued by him, as in the bill mentioned; and it is ordered, that the said Master do tax the Defendant, *Robert Withy,* his reasonable costs, charges, and expences, necessarily and properly incurred as sequestrator, and all parties their costs of this suit; and it is ordered, that out of the money in

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the hands of the said Defendant, *Robert Withy*, in respect of such tithes, rents, and profits as aforesaid, the said *Robert Withy* be at liberty to retain what shall be so taxed for his costs, and also for the costs of the Defendants, *Ann Osborn* and *Richard Osborn* as aforesaid; and it is ordered, that he do thereout also pay unto the Plaintiff, and the several other Defendants, their costs of this suit; and it is ordered, that the said *Robert Withy* do pay the surplus money which shall remain in his hands, on account of such tithes, rents, and profits as aforesaid (if any) after such several payments as aforesaid, in satisfaction of what shall be reported due to the Plaintiff, under the direction hereinbefore given, in case the same shall be sufficient for that purpose; but in case the same shall not be sufficient for that purpose, then it is ordered that the same be paid in part satisfaction thereof, so far as the same will extend; and in that case, it is ordered that the said Defendant, *Robert Withy*, do out of all and every the quarterly payments of the tithes, rents, and profits of the said rectories, which shall from time to time come to his hands, after keeping down the two annuities or yearly sums of 126*l.* and 89*l.*, in the pleadings mentioned, pay the balance of such tithes, rents, and profits as aforesaid unto the Plaintiff, until the whole of the principal, interest, and costs which shall be so reported due to him under the directions hereinbefore given, shall be fully paid and satisfied; and it is ordered, that the said Defendant *Robert Withy*, do pass his accounts annually before the said Master, until the debt due to the Plaintiffs shall be reported to be fully paid and satisfied; with the usual directions for taking the accounts, and liberty to apply.

(Reg. Lib. A. 1817. fol. 1769.) (*a*)

(*a*) See *Jones* v. *Barrett*, Bunb. 192. *Errington* v. *Howard*, *Amb.* 485. "If the sequestrators being called there-

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thereunto by the ecclesiastical court, delay to give an account, the judge useth to deliver to the party grieved the bond given, with a warrant of attorney to sue for the penalty thereof to his own use at the common law." *Watson*, Clergyman's Law, c. 30. p. 308.

April 11.

LLOYD v. GURDON and CHARRITEÉ.

Injunction to restrain the negotiation of bills of exchange void in their creation.

THE bill prayed that three bills of exchange accepted by the Plaintiff, payable to the Defendants, for a sum of 8000*l*. won at play, might be delivered up to be cancelled.

Sir *Samuel Romilly* and Mr. *Collinson* now moved, on certificate of bill filed and affidavit, for an injunction to restrain the Defendants from parting with the bills; suggesting that though the bills were void in their creation (*a*), yet their negotiation would induce a necessity of making other persons parties to the suit. (*b*)

The *Lord Chancellor* granted the injunction.

(*a*) The statute 9 *Ann*, c. 14. s. 1. enacts, "That all notes, bills, *&c.*, where the whole or any part of the consideration shall be money or other valuable thing won by gaming or playing at cards, *&c.* shall be void to all intents and purposes." See *Robinson* v. *Bland*, 2 *Burr.* 1077. 1 *Bl.* 234. 256. *Bowyer* v. *Bampton*, 2 *Str.* 1155.

(*b*) On this principle a vendor, defendant to a bill for a specific performance, has been restrained from conveying the legal estate. *Echliff* v. *Baldwin*, 16 *Ves.* 267.

"His

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"His Lordship doth order that an injunction be awarded to restrain the said Defendants from indorsing, negotiating, or parting with the said three bills of exchange or promissory notes, or either of them, in the said bill mentioned, until the Defendants shall fully answer the Plaintiff's bill, or this court make other order to the contrary."

(Reg. Lib. B. 1817. fol. 663.) (a)

(a) · v. *Blackwood*, 3 *Anstr.* 851.

The ATTORNEY-GENERAL *v.* LEPINE.

June 22.

Residuary estate bequeathed to the minister and church-officers of a parish in *Scotland*, for charitable purposes, was directed to be invested in stock, in the name of the Accountant-General, and the dividends to be paid from time to time to the minister and church-officers of the parish; but the courts of *Scotland* having jurisdiction to administer the charity, an order confirming the master's report, in approbation of a scheme, was reversed.

JOHN M'NABB, late of *Mile End*, in the county of *Middlesex*, by his will, dated the 8th of *May* 1800, bequeathed a moiety of the residuary estate in these words: "to be laid out in the public funds, or some such security, on purpose to bring one annuity, income, or interest, for the benefit of a charity or school, for the poor of the parish of *Dollar*, and shire of *Clackmannan*, where I was born, in *North Britain*, or in *Scotland*; that I give and bequeath to the minister and church of the said parish for ever, say to the minister and church-officers for the time being, and no other person shall have power to receive the annuity but the aforesaid officers for the time being, or their agent appointed for the time by them."

An information and bill having been filed in 1803, by the minister and elders of the parish of *Dollar*,

against

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against *M'Nabb's* executors, by the decree made at the hearing for farther directions, on the 8th of *August* 1805, it was ordered that the Master should approve a scheme for carrying the charity into execution, and that the relators and plaintiffs should be at liberty to lay proposals before the Master for that purpose.

On the 22d of *February* 1815, the Master's report, approving a proposal, was confirmed, and it was ordered that the scheme therein stated should be carried into execution. (*a*)

From these decretal orders, the Attorney-General and the relators appealed, insisting that the information and bill prayed no directions for carrying the charity into execution, and that the Court never gives directions for establishing a charity in *Scotland*, but directs the money to be paid to the trustees, who must administer it according to the law of *Scotland*, and under the direction of the Court of Session, in case it becomes necessary to resort to any court for direction.

The *Solicitor General*, Sir *Samuel Romilly*, and Mr. *Bell*, in support of the appeal.

The LORD CHANCELLOR.

I have always understood that where a charity is to be administered in *Scotland*, this Court does not take into its own hands the administration. The gift being for the foundation of a *Scottish* charity, is certainly good (*b*); but the courts in *Scotland* would have to de-

(*a*) 19 *Ves.* 309.

(*b*) See *Campbell* v. The Earl of *Radnor*, 1 *Bro. C. C.* 271. *Oliphant* v. *Hendric*, 1 *Bro. C. C.* 571. *Curtis* v. *Hutton*, 14 *Ves.* 537. *Mackintosh* v. *Townsend*, 16 *Ves.* 330.

termine

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termine what kind of school or charity should be established. (*a*)

The decree (reversing the former orders, so far as they confirmed the Master's report, and directed an execution of the scheme approved by him,) ordered various sums of stock, constituting a moiety of the testator's estate, to be sold, and the money arising from the sale to be laid out in the purchase of 3 *per cent.* consols, in the name of the Accountant-General, in trust in the cause; the dividends "to be paid from time to time to the defendant, the Rev. *A. Mylne*, and to the relators, and the plaintiffs, *J. Gibson*, *J. Christie*, and *R. Smith*, or such other person or persons who, for the time being, shall be the minister and church-officers of the said parish of *Dollar*, to be by them applied for the benefit of a charity or school for the poor of the said parish of *Dollar*, pursuant to the will of the said testator," *&c.*

(Reg. Lib. A. 1817. fol. 1601.)

(*a*) *Provost, Bailiffs, &c.* of *Edinburgh* v. *Aubery*, *Amb.* 236.

END OF THE FIRST PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

WILLIAM MAYHEW and ANN GENT,
PLAINTIFFS.

SARAH CRICKETT, ROBERT ALEXANDER CRICKETT, and EDWARD BACON,
DEFENDANTS.

1818.
April 8. 9. 11. 14.

A creditor, whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment and taken the goods of the debtor, and without the knowledge of the sureties, withdrawn the execution, has discharged the sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability.

Right of contribution between co-sureties, whether by separate instruments, or by the same instrument.

THE bill stated, that in *August*, 1814, *Charles Battcley*, being indebted to the Defendants, his bankers, in the amount of 1000*l.* or thereabout, secured by a warrant of attorney to confess judgment, the Defendants agreed to advance to him the farther sum of 300*l.* on condition of his procuring two persons as sureties for the repayment thereof, and also of the former balance;

 and

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and the Plaintiffs having agreed to become sureties, two promissory notes, for 650*l.* each, payable to the Defendants on demand, dated the 20th of *August*, 1814, were signed, one by *Batteley* and *Mayhew*, the other by *Batteley* and *Gent*; that the Plaintiffs had lately discovered that the Defendants did not advance the farther sum of 300*l.* nor any part of it; that in *November*, 1814, the Defendants entered up judgment on the warrant of attorney against *Batteley*, and issued execution thereon, and entered into possession of his dwelling house, and the stock in trade and other effects therein, and after continuing several days in possession, without consulting or apprizing the Plaintiffs, withdrew the execution, *Batteley* paying the expenses; and that in *August*, 1815, *Batteley* again becoming embarrassed, the Defendants for the first time applied to the Plaintiffs for payment of the promissory notes, which the Plaintiffs refused; and in *Michaelmas* term, 1816, the Defendants commenced actions against them.

The bill, charging, that the notes ought in equity to be considered as void and given without consideration; that by withdrawing the execution against *Batteley*, the Defendants had released the Plaintiffs; that *Gent* never requested the Defendants not to press for payment of *Batteley*'s debt; and that if *Mayhew* made such request, it was in ignorance that the execution had been withdrawn, prayed that the Defendants might be decreed to deliver the promissory notes to the Plaintiffs, and indemnify the Plaintiffs against them, and be enjoined from proceeding in the actions at law.

The Defendants, by their answer, stated, that being dissatisfied with the large balance due from *Batteley*, they informed him that unless he procured a joint note from persons of responsibility they would take possession

of

of his effects; and *Battley* promising to give unexceptionable security, the Defendants added that if they were satisfied with the security, they might advance 300*l.* more; that when *Batteley* brought the two promissory notes, the Defendants said that they should make no farther advance till they had satisfied themselves of the security, and after inquiry, refused an advance; and admitting that the execution was withdrawn at the request of *Batteley* on the 6th of *November*, 1814, the Defendants not thinking it necessary to consult or apprize the Plaintiffs, who were not informed of the existence of the warrant of attorney, further stated, that on the application of the Plaintiffs in *August*, 1815, *Mayhew* promised to pay his note in *September* following, and at that time came to the Defendants, representing that it was not convenient then to take up his note, but promised to pay it at *Christmas*, if they would wait till then: denied that they gave time and indulgence to *Batteley* to pay the debt secured by the promissory notes, except by withdrawing the execution; and stated that on the 14th of *February*, 1816, *Mayhew* promised, in the presence of two persons named, to take up the note for which he became answerable, on or before *Lady-day* following, and before that promise, *Mayhew* knew that the Defendants had taken possession of *Batteley's* effects under the execution, and had, at the request of *Batteley* and his friends, abandoned the same, and relied upon the notes as a security for the balance then due to them; and the Defendants stated that they had heard and believed that at the time of such promise, *Mayhew* was in possession of a warrant of attorney given to him by *Batteley* to secure the payment of the 650*l.* and interest, and that *Batteley* soon afterwards committed an act of bankruptcy, which prevented *Mayhew* from taking execution against his effects.

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The Defendants had recovered a verdict against the Plaintiff *Mayhew*, before the common injunction was obtained for want of answer. On a motion, after filing the answer, to dissolve the injunction, the Lord Chancellor, by order of the 13th of *December*, 1817, continued it, with liberty to the Defendants to proceed to trial against Mrs. *Gent*. The Defendants, having declined to proceed to trial, not intending to prosecute their claim against Mrs. *Gent*, now moved to dissolve the injunction.

Sir *Arthur Piggott* and Mr. *Treslove*, in support of the motion, insisted that the grounds on which the Plaintiffs rested their equity, the want of consideration for the notes, and the abandonment of execution by the principal creditor, formed a legal defence, and cited *Hoare* v. *Contencin*. (a)

Mr. *Hart* and Mr. , against the motion, argued that the concurrent jurisdiction of courts of equity was not excluded by the novel equitable doctrines of courts of law; and that the question of fraud in obtaining the notes was peculiarly proper for a court of equity.

The LORD CHANCELLOR.

On the motion for an injunction, two grounds were taken; first, that the principal debtor being indebted to the Defendants in 1000*l*., the contract on which these notes were given was, that if he should produce securities for 1300*l*., the Defendants would advance 300*l*. in addition to the existing debt. In considering the question whether there was that agreement, we must not lose sight of the fact, that security was given for the exact sum of 1300*l*.; and if such was the transaction, I am not quite prepared to say that the sureties could not

(a) 1 *Bro. C. C.* 27.

avail

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avail themselves of their non-liability at law as well as in equity, speaking of law at this day; for many questions, (questions, for example, on marriage brokage bonds, and on lost deeds,) formerly exclusive subjects of equitable jurisdiction, have, since Lord *Mansfield's* time, become subjects of the jurisdiction of courts of law.

The second ground was, that the Defendants, by releasing the execution, had relinquished their remedy, at least, *pro tanto*. I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity. On the other hand, if the surety afterwards makes a promise to pay, he cannot object to that as a promise without consideration: the promise is valid, not as the constitution of a new, but the revival of an old, debt. So, when a bankrupt is discharged by his certificate, he cannot, for that reason, impeach a subsequent promise to pay a former debt, as a promise without consideration.

Although the amount of 1300*l.* is constituted here by separate promissory notes, and, although at one time the doctrine prevailed, that where there were separate securities there should be no contribution, that has been exploded ever since the case of *Deering* v. Lord *Winchelsea*.(*a*) The liability of the plaintiffs must be considered, with reference, not only to general principles, but to the fact that one surety promised to pay, after he knew tnat the execution had been waived; the effect of that may be varied by the circumstance, whether he then knew what was known to the co-surety.

There can be no doubt that it is a question fit to be

(*a*) 2 *Bos. & Pul.* 270. 1 *Cox.* 318.

 tried

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Mayhew v. Crickett and Others.

Principle on which the abandonment of execution against the principal releases the surety.

tried at law, whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill? (a) The principle is, that he is a trustee of his execution for all parties interested in the bill.

The Lord Chancellor.

April 9.

I must be informed whether the Defendants abandon all claim against the Plaintiff, *Gent?* That is an important feature of the case.

April 11.
April 14.

The counsel for the Defendants having undertaken to release the Plaintiff, *Gent*, the Lord Chancellor proceeded to give judgment.

The Lord Chancellor.

The bill is filed by *Mayhew* and *Gent*, against the latter of whom I must consider the Defendants as having no demand,

(a) On the question what transactions, with the principal, or person primarily liable, discharge the surety, or person secondarily liable, see, *Skip* v. *Huey*. 3 *Atk.* 91. *Nisbet* v. *Smith*, 2 *Bro. C. C.* 579. *Rees* v. *Berrington*, 2 *Ves. Jun.* 540. *Law* v. *The East India Company*, 4 *Ves.* 824. *Ex parte Gifford*, 6 *Ves.* 805. *Boultee* v. *Stubbs*, 18 *Ves.* 20. *Bank of Ireland* v. *Beresford*, 6 *Dow.* 233. *Samuel* v. *Howarth*, 3 *Mer.* 272. *Eyre* v. *Bartrop*, 3 *Madd.* 221. *Hodgson* v. *Nugent*, 5 *T. R.* 277. *The King* v. *The Sheriff of Surrey*, 1 *Taunt.* 159. *Thomas* v. *Young*, 15 *East*, 617. *Bowsfield* v. *Tower*, 4 *Taunt.* 456. *Croft* v. *Johnson*, 5 *Taunt.* 319. *Moore* v. *Bowmaker*, 6 *Taunt.* 379. *Bowmaker* v. *Moore*, 3 *Price* 214. *Brickwood* v. *Anniss*, 5 *Taunt.* 614. *Tindal* v. *Brown*, 1 *T. R.* 167. 2 *T. R.* 186. *Ex parte Smith*, 3 *Bro. C. C.* 1. *Walwyn* v. *St. Quintin*, 1 *Bos. & Pull.* 652. *English* v. *Darley*, 3 *Esp.* 49. 2 *Bos. & Pull.* 61. *Gould* v. *Robson*, 8 *East*, 576. *Clark* v. *Devlin*, 3 *Bos. & Pull.* 363. *Withal* v. *Masterman*, 2 *Campb.* 179.

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demand, since they prosecute none. It appears from the answer that there had been a proposition for an advance of a sum of 300*l.* in addition to the original debt; it is now admitted that the two notes of 1300*l.* can be considered as a security for 1000*l.* only, and, therefore, each note, in a court of equity, at least, is a security for only 500*l.*, the Defendants never having advanced the 300*l.* or any other sum. The bill charges, as a particular ground of the equity on which the Plaintiffs insist, that two promissory notes were given, to enable the debtor to obtain time for 1000*l.*, and a further advance of 300*l.*; and that the advance not having been made, the notes ought not to be considered as a security for the existing debt. The mere circumstance that the Plaintiffs did not know that the Defendants held a warrant of attorney, would be of no consequence, because sureties are entitled to the benefit of every security which the creditors had against the principal debtor (*a*), and whether the surety knows the existence of those securities is immaterial; and I think it clear, that, though the creditor might have remained passive if he chose (*b*), yet, if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety, both at law and in equity; and I cannot but believe that there must have been some mistake on the part of the learned judge, at *nisi prius*; that, however, should have been made the subject of a motion for a new trial.

Sureties are entitled to the benefit of every security which the creditor has against the principal.

Distinction between a creditor remaining passive, and taking out and withdrawing execution.

(*a*) *Parsons* v. *Briddock*, 2 *Vern.* 608. *Ex parte Crisp*, 1 *Atk.* 135. *Gammon* v. *Stone*, 1 *Ves.* 339. *Lee* v. *Rook*, *Mos.* 318. *Sir Daniel O'Carrol's Case*, *Amb.* 61. *Wright* v. *Simpson*, 6 *Ves.* 714. 734. *Ex parte Rushworth*, 10 *Ves.* 409. *Wright* v. *Morley*, 11 *Ves.* 12. *Glossop* v. *Harrison*, *Coop.* 61. *Antrobus* v. *Davidson*, 3 *Mer.* 569. *Robinson* v. *Wilson*, 2 *Madd.* 434. *Hoatham* v. *Stone*, cit. 2 *Madd.* 437. 1 *Madd. Princ. and Prac.* 236, n. g. *Plumbe* v. *Sanday*, *Id.* n. h.

(*b*) 6 *Ves.* 734. *The Trent Navigation Company* v. *Harley*, 10 *East* 54. *Ex parte Mure*, 2 *Cox*, 63. 74.

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MAYHEW v. CRICKETT and Others.

Effect of a promise to pay a debt by a surety who has been discharged by indulgence to principal.

The application of the Defendants, in equity, proceeds on quite a different principle. They swear, that in the presence of two witnesses, *Mayhew*, knowing that the execution had been withdrawn, promised to pay the debt; and it cannot be objected that there is a want of consideration for such a promise. If a creditor, having given time to the debtor primarily liable, makes a demand on one who is secondarily liable, and receives a promise from him, that is sufficient to sustain the demand, not as the creation of a new, but as the revival of an old, debt. (*a*) With respect to the other Plaintiff, Mrs. *Gent*, it must be assumed, that the Defendants have no demand against her. That reduces the case to this singular condition, that one surety is discharged while there is a verdict against the other; and the Court must consider the effect of the discharge of one of two co-sureties. The fact, that the liability arises on separate instruments, affords no distinction as to the right of contribution between the sureties. The law is so settled by *Deering* v. Lord *Winchelsea*. I recollect that the decision in that case disturbed the then existing notions in *Westminster Hall;* having myself been counsel against that doctrine, I was much dissatisfied with it; but on farther and maturer consideration I ought to make so much amends as to say, that I am convinced it was right. When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him, you have discharged a surety from whom I might

(*a*) On the revival of debts by a subsequent promise, see, *Hyleing* v. *Hastings*, *Lord Raym.* 389. 421. *Com.* 54. *Carth.* 470. 1 *Salk.* 29. 12 *Mod.* 223. 5 *Mod.* 425. *Rep. Temp. Holt*, 427. *Southerton* v. *Whitlock*, 2 *Str.* 690. *Trueman* v. *Fenton*, *Cowp.* 544. *Ex parte Burton*, 1 *Atk.* 255. *Birch* v. *Sharland*, 1 *T. R.* 715. *Rogers* v. *Stevens*, 2 *T. R.* 713. *Cockshott* v. *Bennett*, 2 *T. R.* 763. *Hopes* v. *Alder*, 6 *East* 16. n. *Lundie* v. *Robertson*, 7 *East* 231. *Besford* v. *Saunders*, 2 *H. Bl.* 116. *Lynbuy* v. *Weightman*, 5 *Esp.* 198. *Mucklow* v. *St. George*, 4 *Taunt.* 613. *Fleming* v. *Hayne*, 1 *Stark.* 370. *Whitehead* v. *Howard*, 2 *Brod. & Bing.* 372.

have

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have compelled contribution, either in my own name in equity, or using your name at law. (a)

Another view is, whether the circumstances of the case would not raise the question, — whether it is competent to the Defendants to make any use of the promissory-notes, if the fact is, as the bill alleges, that the principal debtor had solicited a farther advance of 300*l.*, and that, when the sureties lent their names on instruments which raised a demand for 1300*l.*, the Defendants refused an advance, and now claim the notes as securities for the previous debt? There is some ground to infer, that the real dealing was for an advance of 300*l.* *ultra* the 1000*l.*; and two points therefore require consideration; 1*st*, I am by no means clear, that if the sureties could establish that, it would not be a defence at law; though I am not disposed to say, that therefore a Court of equity would not relieve: but, 2*dly*, The surety must have known, that the execution had been withdrawn, and his promise to pay is to be considered as a promise made, in all probability, with a knowledge of the circumstances of the case.

A creditor cannot avail himself of security obtained under an agreement, for a further advance, which he afterwards refuses.

On the whole, I am of opinion, that the Plaintiff, *Mayhew*, must pay into Court so much, as with what the Defendants have received from the bankrupt's estate (b), will amount to 500*l.*, without prejudice. On those terms the injunction must be continued.

(a) On the right of contribution between co-sureties, see, *Cooke* v. ——— 2 *Freem.* 97. *Toth. fo.* 41. *Hole* v. *Harrison*, 1 *Ca. in Cha.* 246. *Rep. Temp. Finch*, 15. 203. *Peter* v. *Rich*, 1 *Rep. in Cha.* 19. *Swain* v. *Wall*, 1 *Rep. in Cha.* 80. *Fleetwood* v. *Charnock*, *Nels.* 10. *Layer* v. *Nelson*, 1 *Vern.* 456. *Lawson* v. *Wright*, 1 *Cox.* 275. *Deering* v. *The Earl of Winchelsea*, 2 *Bos. & Pull*, 270. 1 *Cox*, 318. *Cowell* v. *Edwards*, 2 *Bos. & Pull.* 268. *Ex parte Gifford*, 6 *Ves.* 805. *Craythorne* v. *Livinburne*, 14 *Ves.* 160. *Dunn* v. *Slee*, 8 *Taunt.*

(b) A commission of bankrupt had been issued against *Battcley*.

1818.

April 16
May 2.
Nov. 11.
1819.
Jan. 28.
April 20.
May 1.
July 22.

PARKHURST *v.* LOWTEN.

THE substance of the pleadings in this cause is stated, on the report of the motion for production of papers referred to by the answer, 1 *Mer.* 391.

A witness objecting to answer interrogatories before the Examiner or Commissioners, demurs, by stating his objection on oath; his demurrer may then be set down for argument; and if overruled, the witness pays the same costs as a defendant on demurrer.

Demurrer to interrogatories by an attorney overruled, without prejudice to the witness's demurring on his re-examination, stating his reasons.

E. S. Godfrey, having demurred to the interrogatories exhibited to him for his examination, on the ground that they referred to transactions in which he was employed as attorney and solicitor, the Vice-Chancellor ordered the demurrer, which had been set down to be argued among demurrers to bills, to be struck out of the paper, and afterwards refused a motion not supported by affidavits, that the demurrer might be overruled. (*a*)

1818. April 16. May 2.

A motion was now made by the Plaintiff, that the demurrer of the witness might be set down for argument, next after the pleas and demurrers, already appointed.

The *Solicitor General* and Mr. *Sidebottom* in support of the motion.

A witness to whom interrogatories are tendered which he is not bound to answer, can protect himself only by demurrer; if the party exhibiting the interrogatories is dissatisfied, the opinion of the Court may be taken by setting down the demurrer for argument. The following precedents establish the practice: *The South Sea Company* v. *Delliffe* (*b*) *Hildersley* v. *Devisher* (*c*), *Vaillant*

(*a*) *Parkhurst* v. *Lowten*, 3 *Madd.* 121., where the demurrer is stated.

(*b*) Cit. 2 *Atk.* 525. 2 *Ves.* 377. and under the name of *d'Oliphant* v. *South Sea Company*, 1 *Ves.* 318.

(*c*) Cit. 2 *Atk.* 593. under the name

lant v. *Dodemead* (*a*), *Shepherd* v. *Downing*, from the Registrar's Book (*b*), *Smithson* v. *Hardcastle*. (*c*) 1818.

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Sir

name of *Kildersley* v. *d' Fisher* *Mos*. 195. (On the mention of this report the Lord *Chancellor* remarked, that although it had been said that *Moseley* should never be cited, his book contains many good cases.) *Hildersley* v *Devisher* 24th *April*, 1729, "It is ordered that the demurrer put in by the Defendant, &c. to the interrogatories exhibited by the Plaintiffs, be set down to be argued next after the pleas and demurrers already ordered; but the same is to be set down within four days or else this order is to be of no effect." Reg. Lib. A. 1728. fol. 232.

(*a*) 2 *Atk*. 524. 592.

(*b*) "*Shepherd* v *Downing*, 6th *February*, 1744. The matter of the demurrer put in by *William Graves*, Esq. to the interrogatories exhibited by the Plaintiff for the examination of witnesses in this cause, coming this present day to be argued before the Right Honourable the Lord High *Chancellor*, &c. his Lordship held the said demurrer to be insufficient, and doth order that the same be overruled." Reg. Lib. B 1744. fol. 249. "19th *February*, 1744. Upon opening of the matter this present day unto this Court by Mr. *Browne*, of counsel with the Plaintiff, it was alleged that this cause being at issue, the Plaintiff sued out a commission for examination of witnesses, and the same being returned, and publication passed, and the commission being opened, the Plaintiff found that *William Graves*, Esq. a material witness for him had demurred to the interrogatories exhibited to him, and refused to answer: that the said demurrer was set down, and upon arguing has

(*c*) 1 *Dick*. 96. See also *Jefferson* v. *Dawson*, 2 *Ca. in Cha.* 208. *Nightingale* v. *Dodd*. *Mos*. 228. *Bowman* v. *Rodwell*, 1 *Madd*. 266.

been

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Sir *Arthur Piggott* and Mr. *Wetherell*, for the Defendants.

The question, whether the witness is privileged from answering these interrogatories, cannot be decided in this form. The witness is not entitled to demur in the general terms of this demurrer; he may be bound to disclose some facts of which he obtained a knowledge as attorney; and must, therefore, specify the questions from which he seeks to protect himself by his privilege.

Mr. *Bell* for Mr. *Godfrey*.

The witness is willing to answer so far as his duty to his client admits. He will be subjected to difficulty if his privilege is to be decided on demurrer; since, if the Court shall think him bound to depose to a single document, the demurrer, it will be said, is too extensive, and must be overruled. The course suggested by the Vice-

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been overruled; that the said *William Graves* is a very material witness for the Plaintiff, and is now in town, but as publication is passed, the Plaintiff cannot examine him without an order, and therefore it was prayed that the said *William Graves* may pay the Plaintiff the costs occasioned by the said demurrer, to be taxed, or such other costs as the Court shall think fit; and that he may be examined by one of the examiners of this Court, upon the said interrogatories, at his own expense; whereupon, and upon hearing, &c. it is ordered that the said *William Graves*, do pay unto the Plaintiff the sum of five pounds for the costs of the said demurrer; and it is further ordered that the said *William Graves* do attend and be examined in the examiner's office upon the said interrogatories, and the Plaintiff is to file the same within a week." Reg. Lib. B. 1744. fol. 190.

Chancellor

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Chancellor is, that the Plaintiffs should specify the facts, or the general nature of the case, to which they propose to examine the witness, who will then have an opportunity of raising the question, whether the examination is consistent with his professional duty.

The LORD CHANCELLOR.

The first question is, whether the proceeding for deciding the validity of the witness's objection should be by setting down the demurrer? Upon that point, the cases cited have settled the practice of the Court. We proceed as far as possible, by analogy to law. At law the witness swears to the facts which privilege him, and the Court then decides the question of privilege. Objecting to answer concerning facts which came to his knowledge as attorney, he must swear that he acted as attorney, and that he so acquired the knowledge. In this Court, the only way in which a witness can protect himself, is to state his objection before the examiner or the commissioners; the commissioners in a country cause return the commission with what is called the witness's demurrer, and the question is brought before the Court, by setting that down for argument. Certainly it is not, strictly speaking, a demurrer, which is an instrument that admits facts stated, for the purpose of taking the opinion of the Court; but by an abuse of the term, the witness's objection to answer is called a demurrer, in the popular sense; and there must be a way by which the Court can judicially determine its validity. I shall follow the example of Lord *Hardwicke.* It may frequently happen, that there is nothing in the pleadings or the interrogatories from which the commissioners or the examiner could collect, that the witness was in a situation which imposed on him a duty, for the protection of others, to decline an answer.

The

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The register informs me, that by the practice, when the demurrer of the witness is overruled, he pays the same costs as on the demurrer of a Defendant. (*a*)

"*4th May*, 1818. Whereas Mr. *Solicitor General*, and Mr. *Sidebottom*, of counsel for the Plaintiffs, this day moved and offered divers reasons, &c. that the demurrer put in by *E. S. Godfrey* to the interrogatories exhibited to him, &c. might be again set down for argument, the same having been struck out by order of his Honour the Vice-Chancellor, with liberty for the parties to apply to have the same restored, next after the pleas and demurrers already appointed, in the presence, &c. Whereupon, &c. his Lordship doth order the said demurrer to be restored to the paper to be argued before his Lordship."

Reg. Lib. B. 1817. fol. 919. (*b*)

The

(*a*) Vide *Shepherd* v. *Downing*, ante, p. 195. n.

(*b*) *Nov.* 18. 27 *Car.* 2. 1675. "*Herbert* v. *Mayn* — A witness demurred to the interrogatories because he claimed a title to the land, but did not set forth how, nor under whom, nor swear that he had a title, and so overruled, and a commission awarded to take the oath of the aged witness." — Lord *Nottingham's* MSS.

Demurrer of a witness to interrogatories inquiring after matter defamatory to a third person, and not material in the cause, allowed.

Mulgrave v. Lord *Dunbar*. "The Plaintiff's bill was to have a discovery who were his father and mother, whether dead or alive, and what estate they left, real or personal, on surmises that he had been bred as a gentleman, and had been told, from time to time, sometimes that he was the son of A, other times of B; sometimes that he had considerable real estate in this country, sometimes in that, or that he was entitled to a considerable distributive share of his father or his mother's personal state.

Lord *Dunbar*, by answer, admitted him to be his natural son, and that he had been at the charge of his education,

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The demurrer of the witness was argued.

The *Solicitor-General*, Mr. *Heald*, and Mr. *Sidebottom*, against the demurrer.

It is clear, that unless the witness is privileged from answering any part of the interrogatories, the demurrer objecting generally to answer, is too extensive, and must be overruled. In *Vaillant* v. *Dodemead* (*a*), Lord *Hardwicke* expresses his opinion, that these demurrers should be held to very strict rules, and overruled the demurrer as covering too much.

There is no doubt that an attorney is privileged from revealing the confidential communications of his client. *Robson* v. *Kemp* (*b*), *Fountain* v. *Young* (*c*), *Rex* v. *Withers*. (*d*)

tion, but did not disclose by whom; and the Plaintiff attempted to prove who his mother was, in expectation of receiving a considerable sum, rather than that matter should be brought to light. The witnesses demurred to the interrogatories; and though they did not ask them to disclose any matter defamatory to themselves, yet Lord Chancellor allowed the demurrer, upon this ground, that the matter inquired of would, if disclosed, be defamatory to a third person, and did not appear to be material in the cause." Mr. *Cox*'s MSS. The date of this case is not stated, but it occurs among Lord *Colchester*'s MSS. in a book entitled as containing cases in 1713, 1715, 1765.

(*a*) 2 *Atk.* 524.

(*b*) 5 *Esp.* 52.

(*c*) 6 *Esp.* 113.

(*d*) 2 *Campb.* 168.; and see *Bulstrod* v. *Letchmere*, 2 *Freem.* 5. 1 *Ca. in Cha.* 277. *Rex* v. *Dixon*, 3 *Burr.* 1687. *Sloman* v. *Herne*, 2 *Esp.* 695. *Brad* v. *Ackerman*, 5 *Esp.* 120. *Gainsford* v. *Grammar*, 2 *Campb.* 9. *Stratford* v. *Hogan*, 2 *Ball* and *Beat.* 164. *Cromack* v. *Heathcote*, 2 *Brod.* & *Bing.* 4.; and the privilege has been extended to an interpreter as "the organ of the attorney." *Du Barré* v. *Livette*, *Peake*, *N. P.* 77. n. *T. R.* 756.; and see *Parkins* v. *Hawkshaw*, 2 *Stark.* 239.

But

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But he must answer "to a fact of his own knowledge, and of which he might have had knowledge without being attorney in the cause. As suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So, if the question were about a razure in a deed or will, he might be examined to the question, whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head." (*a*) The distinction is between confidential communications, and transactions, at which he is present merely as witness, and where the presence of any unprofessional person might have been sufficient. — *Cutts* v. *Pickering* (*b*), *Jones* v. *Countess* of *Manchester* (*c*), *Vaillant* v. *Dodemead* (*d*), *Sandford* v. *Remington* (*e*), *Doe* v. *Andrews* (*f*), *Wilson* v. *Rastall* (*g*), *Spenceley* v. *Schulenburgh* (*h*), *Duffin* v. *Smith* (*i*), *Bowles* v. *Stewart*. (*k*)

It is clear, to omit other particulars, that this witness must answer, whether he was present at the contract, and whether he has the deed. He has not even stated for whom he was employed as attorney. His privilege arises not from the character of attorney, but of attorney to a particular individual. It is the privilege of the client,

(*a*) *Buller, N. P.* 284.
(*b*) 1 *Vent.* 197.
(*c*) *Ibid.*
(*d*) 2 *Atk.* 524.
(*e*) 2 *Ves. Jun.* 189.
(*f*) *Cowp.* 845.
(*g*) 4 *T. R.* 753.
(*h*) 7 *East.* 357.
(*i*) *Peake, N. P.* 108.
(*k*) 1 *Schoales & Lefr.* 226.; and see *March* 83. pl. 136. *Annesley* v. *Earl of Anglesea*, 17 *Howell's* State Trials, 1228—1244. *Duchess of Kingston's* Case, 20 *Howell's* State Trials, 613, 614. *Lord Say* and *Seal's* Case, 10 *Mod.* 40. *Rex* v. *Watkinson*, 2 *Str.* 1122. *Cobden* v. *Kendrick*, 4 *T. R.* 431. *Bishop of Winchester* v. *Fournier*, 2 *Ves.* 445. *Copeland* v. *Watts*, 1 *Stark.* 95.

and

and, if he assents, may be waived — *Lea* v. *Wheatley*. (*a*) It would be singular, that a plea of privilege should omit to name the party privileged.

The demurrer is not duly authenticated; the witness must make affidavit of the truth of its contents. *Nightingale* v. *Dodd*. (*b*)

Sir *Arthur Piggott*, Mr. *Wetherell*, Mr. *Bell*, and Mr. *Spence*, for the demurrer.

The demurrer is a statement by the witness under examination, and is therefore made on oath. The Court will not establish a practice analogous to that which regulates demurrers to bills; but will direct a reference to the master to inquire what interrogatories the witness must answer. The design of the interrogatories is to convict the witness's client of simony.

The LORD CHANCELLOR.

A witness demurring as attorney, must state by whom he was employed.

The witness demurring, on the ground that his answer would violate the confidence reposed in him as attorney, must name the party to whom he was attorney. In my limited experience at *nisi prius*, I recollect no instance in which the attorney's privilege prevailed, except where it was the privilege of one of the parties in the cause; but I would not be understood to say, that it was not so. (*c*) If *Brooksby* (*d*) were called he might state, that the bill alleges a simoniacal contract, and object to answer whether it was made, or even what sum was paid,

(*a*) *C. B. Pasch.* 30. *Car.* 2. 20 *Howell's State Trials*, 574. n.

(*b*) *Mos.* 228.

(*c*) It seems that the privilege prevails although the client is not a party to the suit. *Sloman* v. *Herne*, 2 *Esp.* 695. *Rex* v. *Withers*, 2 *Campb.* 578. *Copeland* v. *Watts*, 1 *Stark.* 95.

(*d*) The purchaser of the first presentation in 1799.

 because

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because he is not bound to answer any one question among many, which, as a link, has a tendency to subject him to a penalty. There might be a doubt, to what extent the attorney could protect himself from answering to information which he acquired as attorney, though not perhaps as attorney for *Brooksby?* It is consistent with this demurrer, that the knowledge of these facts was acquired by the witness as attorney for the Plaintiff.

If the demurrer is overruled, the next proceeding in regular course would be, a motion to commit the witness for not answering. Supposing an error in the form only of the demurrer, I would afford to the witness an opportunity of correcting it; but he must be careful so to frame his demurrer that it may embody in it the rule of law relative to the privilege of an attorney. The distinction is extremely nice between the questions which the attorney is bound to answer, and those which he is privileged from answering.

Though we give to this instrument the name of demurrer, it is nothing but the witness's tender of reasons why he should not answer the questions. As it now stands, I think the demurrer bad, and that a mere insertion of the name of the client will not supply the defect. The proper way of disposing of it will be, to declare that the reasons stated by the witness are not sufficient to prevent his farther examination on these interrogatories, but with liberty to state any other reasons against being examined.

Unless the argument which has been urged is valid, that the demurrer being the statement of the witness under examination, is made on oath, it must be supported

by

by affidavit. The examiner ought to take the statement of the witness on oath. It is clear, that in some way the Court ought to have the sanction of an oath for the facts on which the objection is founded. 1818. PARKHURST v. LOWTEN.

On this day the Plaintiff moved that the minutes of the last order might be varied. 1819. *Jan.* 28.

The *Solicitor-General*, Mr. *Heald*, and Mr. *Sidebottom*, in support of the motion.

Sir *Arthur Piggott*, Mr. *Wetherell*, and Mr. *Spence*, against the motion.

The Lord Chancellor.

The minutes are certainly not correct, and require alteration.

The word "demurrer," as I have repeatedly observed, is used not in a very appropriate sense, in a business of this kind, to signify some objection by a witness to answer a question addressed to him; and though we find in the books cases in which the witness has been heard on demurrer, yet the oldest of us recollect no such case in our experience.

Mr. *Godfrey* having been employed as solicitor, properly thought that he ought not to submit to an examination with repect to transactions of his client, unless compellable by law. It is true that this demurrer, using the term in its inappropriate sense, must have been overruled, if for this reason only, that the witness has not stated by it who his client was; but on the other hand, it is impossible to say that these interrogatories do not

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contain many questions which no protection that an attorney can claim, not on his own account but on that of his client, can shield him from answering. In the ordinary courts of law, if Mr. *Godfrey* were called as a witness, he would make his objection, stating, under the sanction of his oath, the circumstances in which he stood, as grounds for calling on the Court to protect him from answering particular questions. We have great difficulty here in knowing how to deal with these proceedings, not passing in Court, but the witness being examined before commissioners, or in the examiner's office.

A witness demurring to interrogatories before the examiner or commissioners, must state his reasons on oath.

I apprehend, that the witness cannot, before the commissioners or the examiner, say, merely, that he was attorney for *A. B.* and, therefore, will not answer any question; but must, at the hazard of a miscarriage in judgment, place himself before the examiner or the commissioners, exactly in the same state in which a witness at *nisi prius* would place himself before the Chief Justice; that is, must submit to their judgment whether he has or not stated a sufficient reason for protecting himself from answering. If they are of opinion that he ought to answer, and he will not, he declines at the hazard of the animadversion of the Court; but on the other hand, it is too much to say, that if he declines, he must not have some mode of bringing before the Court the question, whether the judgment of the commissioners or the examiner is such as it will approve; and it is impossible for the Court to know whether the witness is right or wrong in his demurrer, unless he states the reasons of it. I therefore meant in this case to have the order drawn up, if possible, in such a way as once for all to make a decision which might serve as a guide for future cases; namely, to point out how a person who is a party to the examination but not to the suit, is to demur;

mur; that is, that his reasons should come before the Court, enabling it to decide on the demurrer exactly in the same way as the judge at *nisi prius*, who, if the witness declined to answer as attorney, would proceed to inform him, that though he might protect his client, there were many questions which he could not so decline answering. I meant to declare, that the reasons stated as grounds of this demurrer were not sufficient, and, therefore, to overrule it; then taking notice, that the commission having been returned, *Godfrey* could not be again examined under it, I meant, that another commission should issue, and that, therefore, the overruling this demurrer was to be without prejudice to *Godfrey's* objecting or demurring to answer questions on such grounds as he should state in his objections; intending thereby to secure to the Court, if the question should come here again, the opportunity of knowing the grounds on which he objected, either to the whole body of the interrogatories, or to some of them; in order that it might have the means of determining whether the judgment of the commisioners or the examiner was right, and of deciding the validity of what is called a demurrer, though quite a different instrument from that to which the name is ordinarily given.

I inquired what Lord *Hardwicke* had done with regard to costs, as a rule for myself; for no one can fail to observe, that he was inclined to overrule the demurrer in the case cited (*a*), with a high hand. If the same rule is applied to the demurrer of a witness which is established for the demurrer of a party, it seems to me that I should adopt that rule, unless a special case is made for higher costs; and if Lord *Hardwicke* gave only 5*l*. costs, I cannot give more.

(*a*) *Vaillant* v. *Dodemead*, 2 *Atk*. 524.

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"*January* 28. 1819. Whereas Mr. *Solicitor-General*, Mr. *Heald*, and Mr. *Sidebottom*, of counsel for the Plaintiffs, moved and offered divers reasons unto the Right Honourable the Lord *High Chancellor* of *Great Britain*, that the minutes of an order made in this cause on the 11th day of *November*, 1818, might be varied, in the presence of Sir *Arthur Piggott*, Mr. *Wetherell*, and Mr. *Spence*, of counsel for the Defendants; upon hearing what was alleged by the counsel on both sides, His Lordship doth order, that the minutes of the said order of the 11th day of *November*, 1818, be rectified, and be as follows: viz. declare, that the reasons stated by *E. S. Godfrey*, in his demurrer, as the grounds thereof, are not sufficient reasons to sustain his demurrer, and, therefore, let the said demurrer be overruled; and the commission issued in this cause for the examination of witnesses having been returned, the said *E. S. Godfrey* cannot be examined without a new commission, and, therefore, let a new commission issue for the examination of the said *E. S. Godfrey*, directed to the commissioners named in the said former commission; but this is to be without prejudice to the said *E. S. Godfrey* objecting or demurring in writing, upon his examination under the new commission, to the interrogatories, or any of them, exhibited for his examination, or to any part or parts thereof, as he may be advised, upon such grounds as he shall state in such objections or demurrer: and let the said *E. S. Godfrey* pay unto the Plaintiffs, the sum of 5*l.* for their costs of the said demurrer."

Reg. Lib. B. 1818, fol. 840.

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A motion was made in behalf of Mr. *Godfrey*, to extend the minutes of the order of the 28th *January*, 1819 by adding that the Plaintiffs are not to exhibit any new interrogatories

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interrogatories without the leave of the Court, and directing a reference to the Master, to settle the old interinterrogatories, by striking out, or altering, so much as required the witness to set forth any information he had received from persons, who, or whose representatives, are not parties to the cause, or any other irrelevant matter.

Mr. *Bell*, for Mr. *Godfrey*, Sir *Arthur Piggott* and Mr. *Wetherell*, for the Defendants, in support of the motion.

It is clear that interrogatories may be suppressed for impertinence. *Practical Register* (*a*), *Cocks* v. *Worthington* (*b*), *Sandford* v. —— (*c*), *Mill* v. *Mill*. (*d*) In the common case the interrogatories are not seen by the adverse party till after publication, and then the interrogatories and depositions are suppressed together; but where, as in this instance, the interrogatories are seen before examination, immediate application must be made, the rule of the Court being, that, for impertinence, the party must apply as soon as apprised of its existence, and waives the objection by delay. A considerable part of these interrogatories (as questions to information) leads to the introduction of matter which cannot be evidence; tending to prove, not a point in issue in the cause, but the criminality of the contract. Before the examiner, a mere ministerial officer, the witness would not be permitted to object to their relevancy. (*e*)

Both

(*a*) *P*. 384.
(*b*) 2 *Atk*. 235. See *Pyncent* v. *Pyncent*, 3 *Atk*. 557. *White* v. *Fussell*, 19 *Ves*. 113.
(*c*) 1 *Ves. jun*. 400
(*d*) 12 *Ves*. 406.

(*e*.) "Commissioners ought not to judge what interrogatories are pertinent, and what not, but are to examine upon the interrogatories as they find them, according to their commission.

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Both the witness and the party are entitled to be protected from the oppression of impertinence. An answer to impertinent interrogatories inflicts on the Defendants the expense of copies of useless depositions.

The witness, an officer of the Court, is bound to object to the disclosure of his client's secrets. It is true that no precedent has been found of such an application by a witness; but there is a want of authorities in the whole proceeding on a demurrer to interrogatories. Unless the irrelevant matter is expunged, the witness cannot meet the case by specific objections, on demurrer; and it is a hardship to be confined to that remedy at the peril of costs. The opinion of the bar has long been, that a witness is entitled to see the pleadings; and the form of the concluding general interrogatory supposes in him a knowledge of the points in issue.

The *Solicitor-General*, Mr. *Heald*, and Mr. *Sidebottom*, for the Plaintiffs, in opposition to the motion.

There is not a single interrogatory of which it may be truly said, that the answer can by no possibility be evidence; the relevance of the interrogatories cannot be ascertained till they are compared with the depositions; if, upon a reference directed after the examination, they are found irrelevant, they will be expunged with costs.

In the examination of an unwilling witness, the Court permits

mission. *Bake* con. *Cole*, *Hill* 9 *Jac*. The commissions were ordered to be renewed, and new commissioners named, the former being rejected for so doing." *Practice of Chancery*, prefixed to *Choice Cases*, p. 16. But commissioners are not "bound to devest themselves entirely of all discretion as to what is or is not, legal evidence." *Whitelocke* v. *Baker*, 13 *Ves*. 515.

permits questions in the form of cross-examination. — *Phillips* on Evidence. (*a*)

The application by a witness is as irregular as novel. It has been decided, that a witness cannot demur to interrogatories for irrelevancy. — *Ashton* v. *Ashton*. (*b*) If such a motion could be sustained, a witness, colluding with one of the parties, and objecting to the questions addressed to him, might, in effect, compel the publication of the interrogatories before examination.

In the course of the argument the following observations were made by

The LORD CHANCELLOR: —

I agree that the Court is bound, at the instance of any person, to take care that no injustice is done; but I think that this motion must be argued on very different principles, as the application of the Defendants, and of the witness. For instance, before the Master, the witness cannot insist that interrogatories shall be struck out, requiring disclosure of what he knows as attorney; that must be done elsewhere. So the witness is not acquainted with the pleadings, and therefore cannot know how to object for irrelevancy; (if, indeed, the opinion intimated from the bar is correct, that the witness is entitled to see the pleadings, that difficulty will be removed;) the Master, according to this application, is to judge what shall remain part of the interrogatories; and whether right or wrong, the witness cannot suffer by his judgment. The party might take the opinion of the Court; but how can the witness proceed for that purpose? If it is insisted that this case is so monstrous that the Court must advert to it as an exception, that may be a question; but care must be taken not to open a door to

(*a*) *Vol.* i. p. 283. (*b*) 1 *Vern.* 165. 1 *Eq. Ca. Ab.* 41.

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an application in every case in which a witness may choose to make it.

There is another circumstance on which I shall not lay much stress, that when the Defendants desire that the examination should be on the old interrogatories, and that the Master should expunge some part of them, they are, in fact, objecting to interrogatories to which they should have objected in an earlier stage of the cause.

It would be a vast thing for the Court, in an order of reference to the Master, to direct him to consider as irrelevant, questions relating to information, from any person, who, or whose representative, is not a party; *non constat* that other witnesses may not prove that the person from whom the information was given, was in such a situation that his information would be evidence.

It is also material to consider whether these interrogatories are addressed to this witness only or to others. Of interrogatories addressed to a variety of witnesses, there is a very great difficulty in saying what part is impertinent with regard to one witness, without knowing the effect of other parts to be exhibited to other witnesses. Supposing that publication has not passed, how can the Master know that the answers of the other witnesses that are to be examined may not make the answer of this witness extremely material? It is one thing to say, that if the Court sees interrogatories, the answer to which cannot by possibility be evidence, let other witnesses state what they will, it will not permit them to be addressed to the witness; and another thing to say that other interrogatories shall not be addressed which may be very material, regard being had to the effect of the depositions of other witnesses, on the testimony of this particular witness. Interrogatories, no answer to which can be received in a court

court of justice, I think that I ought to struggle to strike out; and it certainly is difficult to understand how any answer to some part of these interrogatories can be evidence.

Distinction between examination to prove to a fact, and to prove a crime.

On the other hand, the Court will distinguish between interrogatories to prove a fact, and to prove a crime. Suppose that the presentation in this case had been sold for 6000*l.*, to be paid at a future time, and the owner of the advowson had filed a bill against his trustee who had so sold, for an account of the profits of the sale, and the trustee did not think proper to report the circumstances of the sale or the amount of the money, alleging that he had good reasons to decline answering, might not the Plaintiff ask a witness, whether he paid to the trustee a particular sum? That question is put to establish, not simony, but the fact of payment to a trustee who will not answer. It would be dreadful for this Court to declare that a trustee may so deal with the trust-property, that he shall state to the *cestui que trust* what he has done only to a certain extent, and yet that the *cestui que trust* must believe what he so states.

If the Plaintiff were to ask the late or the present Mr. *Lowten*, whether he was not a party to the execution of this deed, he might refuse to answer; but a third person, a witness to whom the Plaintiff exhibits the deed, and asks, whether he attested the execution, must answer. Thus the Court would oblige the attorney of *Lowten* to show, that *Lowten* had been engaged in a simoniacal contract, from discovering which *Lowten* might protect himself. If the interrogatories are such as not to invade the privilege of the client, which is to be attended to by the attorney, though they bring out proof of simony, yet bringing out proof of payment of the money, they must be answered.

A very

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A very singular question might arise with which the Court could not possibly deal: supposing that *Daniel* had conveyed the right of presentation to *Lowten* in trust to sell; that *Lowten*, in execution of that trust, had sold simoniacally; and that *Daniel* had applied to the Crown for the presentation forfeited, and could produce evidence of the simony.

It is clear, that the Court ought by some means to exclude a question which has no object but to prove simony; but if the object of the question is to prove payment of money, though the effect of the answer is to prove simony, we cannot here exclude it. If a trustee will not state all that belongs to his dealing with the trust-property, the *cestui que trust* is not bound to believe any part of his statement, and is, therefore, entitled to learn from witnesses, not merely what they may choose to state, but all that he has a right to know.

This is in truth no more than a bill for an account. The Defendant has said that he received only 6000*l.*; supposing that he had proceeded to state the time at which he had received it, and other circumstances, and had then gone on to protect himself against a discovery of simony, (for this Court will not require a man to disclose that he has been guilty of a great offence, it is his protection as a party,) he could not be compelled to produce the deeds, and discover that he had involved himself in acts, the consequences of which are penal; but if, in order to try the truth of his statement, which the Plaintiff is never bound to believe, and whether he has duly accounted for the sum which he received as trustee, a witness, an attorney, is examined to prove not simony, but the time, and amount, and circumstances, of payment, and it happens, that in so proving, he proves a case of simony, he has no right to object to that disclosure.

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closure, unless he stands in such a situation that his client is entitled to object. It is true, that such an examination brings forward a case of simony, but brings it forward not as simony, but as a statement of account.

Another consideration here may be this; though in ordinary cases, to know what has passed, the deeds must be produced, yet if a man declines to produce the deeds, as convicting him of simony, I should be glad to know whether this Court would not receive secondary evidence? If a deed is in the hands of a person who objects to the production as convicting him of a crime, whether against a party so objecting, secondary evidence of the contents may not be produced, as in the case of a lost deed, is a question, so far as I know, yet undecided.

When secondary evidence of the contents of a deed is admissible.

Is it clear that, in a case in which the Defendant says that he will not disclose the contents of a deed in his possession, because, if he does, he shall prove himself guilty of an offence, the contents of that deed may not be proved by information? If a man chooses to place a deed in his possession in the same condition as if it were lost, it is a question, whether the contents of that deed may not be proved in the usual mode by which proof is given of the contents of a lost deed?

Can the *Court* undertake to reform interrogatories? How is it to know, that to any individual interrogatory the witness will not return a pertinent answer? Or that, in answer to a question, when the money was paid, he will specify a time which tends to prove simony? Nor can I, in conformity to our practice, admit the witness to state by affidavit, that he will so answer, which would be authorising evidence to be published as soon as given. How can the *Master* settle interrogatories? For that purpose he must know what answer the witness will give;

A witness objecting to answer interrogatories cannot be admitted to state by affidavit what would be the effect of his answer.

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give; and there is no rule of the Court more established than this, that evidence shall not be known till publication has regularly passed.

If the Defendant states, in his answer, that he cannot give any information concerning the account, without giving evidence of his crime, he cannot be compelled to give that information; but that will not entitle other witnesses, who are not in a situation of confidence, to withhold their evidence.

At the close of the argument judgment was given as follows: —

The LORD CHANCELLOR.

The bill, in this case, calls on Mr. *Lowten* to account for the produce of some property vested in him, which he sold as trustee; one part of the property was a right of presentation to an ecclesiastical benefice, and, with what propriety I examine not, the bill has charged that *Lowten*, in execution of his trust, thought proper to sell that benefice to a clergyman who entered into a simoniacal contract with him, and the bill, among other things, seeks information, what money was made in that transaction. *Lowten* put in an answer; and it having been for ages a principle of British jurisprudence, and I hope it will continue so as long as the law continues, that no man shall be called on in a court of justice to accuse himself of an offence, in his answer *Lowten* stated, that by this sale, which, in some modes of conducting it, he might lawfully conclude, he procured a sum of 6000*l*. It was alleged that the terms of the sale being, that a part of the purchase-money should be paid at the date of the bargain, and the rest on putting the incumbent into possession, the contract was simoniacal, forbidden by law under

No man can be compelled to criminate himself.

under severe penalties, no clergyman being capable of taking possession of his benefice without having made oath that he has entered into no such contract. *Lowten* stating that he received the money, did not state when he received it, and insisted on the protection of the law, that being charged wtth the offence of simony, he was not bound, as he certainly was not, to discover any circumstance tending to show that he was guilty; not only not bound to answer any question, the answer to which would criminate him directly, but not any which, however remotely connected with the fact, would have a tendency to prove him guilty of simony. On *Lowten*'s death, the present Defendant of that name succeeded to his fortune, and therefore, in some respects, with reference to that property, became entitled to a similar protection; and the Court refused to compel him to produce deeds proving simony. (*a*) The object of the suit is an account; and *Lowten* not having stated the time of payment of the 6000*l*., the Plaintiff is entitled to examine witnesses to prove that fact; and it is clear that, even if *Lowten* had stated the different times of payment of different parts of that sum, and set forth all the circumstances of the transaction, the Plaintiff would not be bound to believe him, but might proceed by witnesses to prove his own case.

Extent of that privilege.

There is no doubt, that the privilege which protects a man from criminating himself, does not belong to a witness whose disclosures may criminate not himself, but others; if the matter which the witness has to state is relative to the time of payment, he cannot object to make the statement, because it may prove that some other person has been guilty of an offence. *Godfrey*, (who I think acts most properly in struggling as much as possible against this examination, because it is a difficult

(*a*) *Parkhurst* v. *Lowten*, 1 *Mer.* 391.

task

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Parkhurst v. Lowten.

task to take on himself to say what professional confidence will or will not allow him to disclose,) having been professionally concerned in the transactions which this bill characterises as an offence, when the interrogatories are exhibited to him, first takes that course which every one understands to be according to the practice of the Court. There is a great difference between a party or witness who objects to criminate himself, and a person standing in the situation of *Godfrey*. A party cannot be called on to criminate himself: it used to be said that a witness could not be called on to discredit himself; but there seems something like a departure from that; I mean that in modern times, the Courts have permitted questions to show, from transactions not in issue, that the witness is of impeached character, and therefore not so credible. I remember the time when that would not have been done. (*a*) *Godfrey* stands in a very different situation, insisting, not that the disclosure would tend to criminate himself, but that it would consist of matter of which he could obtain a knowledge only by the confidence of his employer. The privilege which he claims is the privilege, not of the attorney, but of the client, and is founded on this consideration, that there would be no safety in dealing with mankind, if persons employed in transactions were compelled to state that which they have learned only by this species of confidence; but the moment confidence ceases, privilege ceases, and the attorney must answer as any other witness; and if there are circumstances in this case to which his testimony may be required without a violation of confidence, *Godfrey* cannot decline answering, because his answer would prove simony in the late Mr. *Lowten*; for the object of such an examination is not to prove simony, but to ascertain

A witness not compelled to discover matter of which he obtained knowledge in professional confidence. The privilege not of the attorney but of the client; its principle, and limitation.

(*a*) The authorities are collected in 1 *Phillips on Evidence*, 289—294., and the conclusion there adopted is, that to questions tending to the degradation of a witness an answer cannot be compelled.

how

how the account is to be taken, and for that purpose it is necessary to prove the contract under which the money was paid, and the times and terms of payment. The object of the examination being legitimate, the witness, unless in a situation of confidence, must answer, although he fixes third persons with offences.

On the former occasion, *Godfrey* put himself on this issue, that he was not bound to answer any part of the interrogatories; his demurrer was overruled; but a declaration was inserted in the order, indicating that, in overruling it, the Court did not proceed on any ground limiting the privilege to which the client was entitled in respect of the confidence reposed by him in *Godfrey*. In these circumstances the present motion, which has been argued with great ability, comes before me. I omit all that has been said on the subject of new interrogatories; the motion seeks a reference to the Master to settle the old interrogatories, first, by expunging or altering so much as requires the witness to state information received from persons who, or whose representatives, are not parties to the cause; secondly, by expunging any other irrelevant matter.

According to my notion of any principle which I am to apply to evidence not yet given, I cannot take on myself to say in any case, but particularly in this, where the party would not produce the instruments, and where he put them in the same situation as if they were lost, that no information received from any person, except a party or the representative of a party, can be evidence. Though not evidence by itself, it may become evidence by the testimony of another person; and information may become evidence by reason of the character of the individual from whom it was received, though neither a party nor the representative of a party.

How again can I say what will be relevant, unless the question is one to which the answer can by no possibility be relevant, neither directly, nor in connection with other evidence? It has been argued, that it was sufficient for Mr. *Lowten* to say, he paid the money for the presentation at a time named, and to refer to his memorandum book and check on his banker; and the time and amount of payment being so ascertained, that the rest of the interrogatories must be expunged. I know not whether such is now the rule of law, but I know that at one period such was not the rule: but supposing it the rule at law, how am I to apply it as the rule in equity? In equity, if the witness thinks that the answer to the interrogatories will criminate him, he demurs, and the opinion of the Court is taken; if he is privileged by the privilege of his client, he states that, and thereon the opinion of the Court must be taken; but for the Court or the Master to declare prospectively, in any stage of the interrogatories, that such an answer will be given by the witness on his examination as enables them to say that no answer should be given, is impossible. Neither the Court nor the Master can know what the answer will be before it is given. I cannot in Chancery pre-suppose the answer, as I might, sitting in the Court of King's Bench, after the witness has proceeded to a certain stage. This part of the application, therefore, is impracticable.

Whether interrogatories may be considered an abuse of the process of the Court, I will not say; but it is clear that I cannot grant this motion according to its terms. I cannot direct the Master to settle these interrogatories upon the principle that no information given by persons other than persons who, or whose representatives, are parties, could be evidence; nor in our course of proceeding is it possible for the Master to say, *ab ante*, what

what will be relevant or irrelevant matter. If the object were to expunge the whole of the interrogatories requiring an answer as to information, it might be necessary to examine the common form. 1819. PARKHURST v. LOWTEN.

Motion refused with costs.

"His Lordship doth not think fit to make any order upon the said notice of motion, but doth order, that the said *E. S. Godfrey* do pay to the Plaintiffs the costs of this application, to be taxed, &c.; but the Plaintiffs are not to file any new interrogatories for the examination of the said *E. S. Godfrey*, without the leave of this Court."

Reg. Lib. B. 1818, fol. 1565.

Mr. *Godfrey*, on his examination under the new commission, having again demurred, the Plaintiffs moved, that copies of such of the interrogatories to which he demurred, and of his demurrer, might be delivered to the clerks in Court for the parties. *July 22.*

The *Attorney-General* and Mr. *Sidebottom*, for the motion, stated, that the order proposed was in the terms of the order made on the former demurrer.

Sir *Arthur Piggott*, Mr. *Wetherell*, and Mr. *Spence*, against the motion.

The Lord Chancellor made the order.

The entry in the registrar's book recites the application by the Plaintiffs' stating the last order, "That a commission was issued in Trinity Term last, in pursuance of the last order, which commission is returned, and now

 remains

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remains with the Plaintiffs' clerk in Court; that the said witness having demurred to the interrogatories, the Plaintiffs are desirous of having copies of the demurrers, which they cannot have without the order of this Court, publication not having yet passed; and therefore it was prayed, that the clerk in Court for the Plaintiffs in this cause, might deliver over to the two senior six clerks, not towards the Plaintiffs or Defendants in this cause, the commission issued in Trinity Term last, for the examination of the said Mr. *E. S. Godfrey*, on the part of the Plaintiffs, with the return thereto; and that the said two senior six clerks might open the same, and deliver over to the clerks in Court, for the parties in this cause, copies of such of the interrogatories, to which the said *E. S. Godfrey* has demurred to answer, and of the demurrer or demurrers showing the grounds thereof respectively; and that the said two six clerks might again seal up the commission, with the return thereto, and re-deliver the same to the Plaintiffs' clerk in Court, without publishing the contents other than delivering copies as aforesaid: Whereupon, &c. his Lordship doth order, that the clerk in Court for the Plaintiffs in this cause do deliver over to the two senior six clerks, not towards the Plaintiffs or Defendants in this cause, the commission issued in Trinity Term, for the examination of Mr. *E. S. Godfrey*, on the part of the Plaintiffs, with the return thereto: and it is ordered, that the two senior six clerks do open the same, and deliver over to the clerk in Court for the Plaintiffs in this cause, copies of the depositions and demurrers of the witness, *E. S. Godfrey*; but such delivery is not to be considered as publication."

Reg. Lib. B. 1818, fol. 1509.

The

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The demurrer of *Godfrey* was set down to be argued. Reg. Lib. B. 1818, fol. 1846. (*a*)

(*a*) " 26th *Feb.* 26 *Car.* 2. 1673—4. A bill charged the suppression of Sir *Charles Hussey*'s will upon all the Defendants, and prayed a discovery. Mr. *King* of *Gray's Inn* demurred, because all his knowledge came as being counsel with my Lady *Hussey*. I overruled it, and ordered him to answer, for the trust of a counsel does not extend to suppression of deeds or wills — *Rothwell* v. *King*." Lord *Nottingham*'s MSS.

" 19th *November*, 26 *Car.* 2. 1674. Between *Spencer* and *Luttrell*. The Plaintiff demanded an annuity, and 6000*l.* arrears, and prayed to set aside a lease precedent for security of portions already satisfied, whereof the Defendant was assignee, and that he might discover satisfaction. Defendant pleads he knows nothing of the satisfaction but as counsel, and demands judgment whether he should discover. Ordered to answer." Lord *Nottingham*'s MSS.

" 7th *July*, 27 *Car.* 2. 1675. Between *Harvey* and Sir *Robert Clayton*. The Plaintiff's father had mortgaged several lands in *Leicestershire*, and the now Plaintiff exhibited a bill against the Defendant, to discover whose money it was that was thus secured, and for whom the Defendant was intrusted. He, by answer, says, that he was ready to receive his principal and interest, and to give the Plaintiff a discharge, or to continue it longer upon payment of interest, if it might be for the service of the family; but as to discovery of the money or the trust, pleads, that he is a scrivener, and trusted with men's estates, and demands the judgment of the Court, whether he shall be obliged to discover; which plea was allowed; for it was safer for the Plaintiff to be ignorant of the trust than to have notice of it; but it may be a ruin to the Defendant, in his trade, to discover it; for no man hereafter will employ him. And what if it be the money of a recusant convict, person outlawed, &c. shall the debtor be revenged of his creditor, and wound him through the sides of his scrivener?" Lord *Nottingham*'s MSS.

" *Stanhope* v. *Nott*. To a bill for discovery of deeds, the Defendant pleaded, that he knew nothing of them otherwise than as counsel, and that he had them not: the

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the Court held, that it was not sufficient to plead that he knew nothing but as counsel, without devesting himself of them, and disclosing to whom he had delivered them; for, otherwise, deeds having been played into the hands of a counsel might be suppressed, and the party injured left without remedy; the plea, therefore, was overruled per Lord Chancellor, to stand for an answer; but with liberty to except as to when and to whom he had delivered the deeds." Mr. *Cox*'s MSS.

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May 4.

BINKS v. LORD ROKEBY.

The purchaser of an estate, sold as tithe free, cannot be compelled to take it subject to tithe on terms of compensation; but an estate of a hundred and forty acres being sold under a decree, the particulars stating about thirty two acres to be tithe free, and no evidence of exemption having been produced on the reference of the title, the Master was directed to certify the proper amount of compensation.

A purchaser under a decree for sale having accepted, and (on a report of an objection to the title, for which compensation was ordered,) returned, possession, must pay interest on the purchase money, from the time at which he took, or at which a title was shown under which he might have safely taken, possession, and is entitled to an allowance for prior, not for subsequent, deterioration of the estate.

ON a reference to inquire, whether a good title could be made to an estate of about a hundred and forty acres, purchased by one *Carter* at a sale under a decree (*a*); by his report, dated the 20th of *December* 1815, the Master certified, that a good title could be made, except that the particulars of sale stated about thirty-two acres of the estate to be tithe free, whereas no sufficient evidence had been produced to him of any part thereof being tithe free.

Sir *Samuel Romilly* and Mr. *Heald* now moved, that the report might be confirmed, and that it might be referred to the Master to certify what allowance should be made in respect of that part of the estate described as tithe free, but not proved to be so.

(*a*) See *Binks* v. *Lord Rokeby*, 2 *Madd.* 227.

Mr.

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Mr. *Bell* and Mr. *Shadwell*, against the motion.

It is now settled by the decision of this Court, in *Ker* v. *Clobery* (*a*), that the purchaser of an estate described as tithe free, cannot be compelled to take it subject to tithe upon terms of compensation. There is no principle by which compensation can be ascertained: the party purchased an exemption from litigation. In *Forteblow* v. *Shirley*, much discussed before your Lordship, it appeared that the estate was subject to the repairs of the chancel of the parish church; the parties agreed to accept an indemnity, settled by an arbitrator; but the Court refused to allow interest, holding the purchaser justified in declining to take possession while the title was in dispute. It was not necessary to except to the report, the blemish being apparent on the face of it.

Sir *Samuel Romilly* in reply.

The reasoning in *Ker* v. *Clobery* is inapplicable to this case. Can the purchaser, acknowledging that he purchased three-fourths, of the estate subject to litigation, insist that the addition of less than one-fourth not, as it is described to be, exempt from litigation, entitles him to renounce the whole contract? He knew that the far larger part of the estate was liable to tithe.

The LORD CHANCELLOR.

Where an estate sold as tithe free is subject to tithe, the Court will not compel the vendee to perform the contract on terms of compensation; but here, as I understand, the estate of about a hundred and forty acres was described as subject to tithe, except thirty-two acres. I am of opinion that the principle which pro-

(*a*) Stated *Sugden's Law of Vendors*, p. 251., where the cases are collected.

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tects the vendee in the former cases, is not applicable to such a case. (*a*)

"This Court doth order, that the said Master's said report, dated the 20th day of *December* 1815, be confirmed, and that it be referred back to the said Master to inquire and certify what allowance is fit and proper to be made to Mr. *R. Carter*, the purchaser of the said estate, in respect of that part of the said estate, containing about thirty-two acres of land, stated to be tithe free, but in respect of which the said Master, by his said report, certified, that no sufficient evidence had been produced before him, of any part thereof being tithe free; and it is ordered, that it be referred to the said Master to settle the conveyance of the said estate, in case the parties differ about the same." &c.

Reg. Lib. A. 1817, fol. 1070.

July 25.

On this day the Plaintiffs moved that *Carter* might on or before the 10th of *August* next pay into the bank 6334*l.* 13*s.*, being the amount of the purchase-money of the estate, after deducting 315*l.* 7*s.*, allowed by way of compensation

On the sale of an estate as tithe free, the question whether tithe free is not a question of title.

(*a*) *Smith* v. *Lloyd*, *July* 16. 18. 1818. On an application for a reference to the Master to certify whether a good title could be made to an estate sold, and whether it was subject to tithe, the Lord Chancellor observed, that whether an estate is free from, or subject to, tithe, is no question of title; when a vendor, represents that he has a good title, and that the estate is tithe free, the question whether tithe free is not a question of title; but a question, whether the estate held by a good title is held free from tithe: if the purchase were of lands and of tithes, then the matter of tithe would be matter of title; but in a purchase of lands free from tithe, the tithe is not matter of title, but of fact.

compensation for the tithes of thirty-two acres, and also 1804*l.* 6*s.*, the amount of interest from the 31st *November* 1812 to the 10th of *August* 1818.

Sir *Samuel Romilly* and Mr. *Heald*, for the motion, insisted on possession taken by the purchaser.

Mr. *Hart* and Mr. *Shadwell* opposed the motion, on the ground that the purchaser had taken possession subject to inquiry into the title, and had abandoned it on the Master's report that the whole estate was liable to tithe; and they claimed a deduction for deterioration of the estate since the purchaser quitted possession.

The LORD CHANCELLOR.

There seems little reason to doubt that the vendor will eventually obtain both a compensation for a supposed liability of part of this estate to tithe, and also the advantage of the fact that it is not liable. I mention that for the sake of the observation, that if this had been a case in which the greater part of the lands sold had been subject to tithe, I should not have followed the doctrine that the purchaser of an estate described as exempt from tithe, shall be compelled to take it subject to tithe; but here only a small part was described as exempt; and the fourth condition of sale expressly stipulates, that errors in description shall not vitiate the sale. I was, therefore, of opinion, that the purchaser must accept the estate.

With regard to possession, the purchaser was not to take possession till he had paid the purchase-money, and that condition of payment could not be performed unless, prior to the time appointed for giving possession, the vendor could show a title under which the purchaser would

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would be safe in taking possession and paying his purchase-money. The case therefore requires, that it should be ascertained when a good title could be made; for, without that, the purchaser was not bound to take possession. That might raise another question; whether, by taking possession which he was not bound to take, he waived objections to the contract. If he ultimately obtains a title, he must be considered, by relation, as in possession, under that title, from the time at which he took possession, and from that time must be understood to say, that if he could hereafter have a title made to him, he was to be considered as in possession, and must receive the rents and profits, and account for interest on the purchase-money. But the fact of possession must be investigated; and it is for those who sell, undertaking that the purchaser might have possession at *Candlemas*, to show that they were in a condition then to give possession. In that case he must pay interest from the time at which he took possession, and even for the time during which he returned the possession.

The purchaser must pay into Court the purchase-money, and the Master must inquire when he took possession; or if he did not take possession, when it appeared by the abstract that he had a title, in respect of which he might take possession; and I reserve the consideration of interest till the report. Those inquiries will go far towards determining what is to be done in respect of deterioration. For, as to deterioration after he took possession, or after there was a title under which he might take possession, the purchaser cannot have an allowance in respect of that; but for deterioration before he took possession, or before there was a title under which he could take possession, he is entitled to an allowance. I therefore reserve also the consideration of allowance for deterioration till after the report.

"His

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"His Lordship doth order, that *R. Carter*, the purchaser of the premises in the said Master's report mentioned, do, on or before the 18th day of *August* next, pay the sum of 6334*l.* 13*s.*" into the bank in the name of the accountant-general, to be laid out, &c.; and it is ordered, that it be referred to the said Master to inquire and state to the Court, whether the said *R. Carter* ever took possession of the estates and premises so purchased by him, and if he did, when he so took possession; and, in case the said Master shall find that he did not, then he is to inquire and state to the Court, when he might have taken such possession, it appearing that a good title could be made. And his Lordship doth reserve the consideration as to the question of interest upon the said purchase-money, and also as to any sum which ought or ought not to be allowed in respect of any deterioration of the said premises, until after the said Master shall have made his report; and, upon payment of the said sum of 6334*l.* 13*s.* into the bank as aforesaid, it is ordered, that the said *R. Carter* be let into possession of the said purchased premises, in case it shall appear he is not already in possession thereof, and into the receipt of the rents and profits thereof, from *Midsummer-day* last; and the said bank-annuities, hereinbefore directed to be purchased, are not to be transferred or disposed of without notice to the said *R. Carter*, the purchaser.

Reg. Lib. A. 1817, fol. 1668.

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May 4.
1819.
May 22. 24.

PROTHEROE *v.* FORMAN.

Injunction to stay execution, on a bill filed after a judgment at law, refused.

THE bill stated, that the Plaintiff, Sir *Henry Protheroe*, having been in partnership with one *Robert Jones*, in a colliery, held under a lease for twenty-one years

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years from 1809, carried on under the firm of the *Pen Van Coal Company*, in *July* 1812, it was agreed that the Plaintiff should be no longer interested therein, and that *Jones* should pay to him an annual rent of 400*l.*; and in *May* 1814, the Plaintiff agreed to let his interest in the colliery, during the remainder of the term, to *Jones* and *Hopkin Perkins*, for a like rent; that the Plaintiff had not retained any interest in the business since *July* 1812; and in *March* or *April* 1812, the Plaintiff, having reason to think that *Jones* had accepted bills in the name of the partnership for his own use, sent to *Homfray, Moggridge*, and Co., the bankers employed by the partnership, a written notice not to discount or pay any bills or drafts of *Jones* on account of the *Pen Van Coal Company*; that in *October* 1813, the partnership of *Homfray, Moggridge*, and Co. was dissolved, and the Defendants, who were partners therein, succeeded to the shares of the retiring partners.

The bill farther stated, that in *January* 1815, a demand was made by the Defendants against the Plaintiff, in the character of a partner in the *Pen Van Coal Company*, for the payment of certain bills of exchange alleged to have been drawn or indorsed by *Jones* in the name of the *Pen Van Coal Company*, in *June*, *July*, and *August*, 1814; and in *March* following, the Defendants brought an action against the Plaintiff and the partners in the *Pen Van Coal Company*, and obtained judgment.

The bill, alleging that the bills were not drawn or indorsed for any purposes relating to the Company, but for the private advantage of *Jones*, and that the Defendants, when they discounted the bills, knew that they were not for the use of the Company, and that the Plaintiff was no longer a partner, charged, that by a

letter

letter in the custody of the Defendants, of the 23d *March* 1812, which reached the hands of *William Fothergill*, who then was, and still continued, the chief clerk of *Homfray, Moggridge*, and Co. and of the Defendants, the Plaintiff gave notice to *Homfray, Moggridge*, and Co. that he would not be responsible for any bills drawn or accepted by *Jones* in the name of the *Pen Van Coal Company*; and that the Plaintiff, though resident within four miles of the town of Newport, where the business of the Defendants is carried on, never received any intimation of the bills till *March* 1815, *Jones* having become bankrupt in *October* 1814.

The bill prayed an injunction against issuing execution upon the judgment obtained, or commencing or prosecuting any action or other proceedings at law against the Plaintiff upon the judgment, or upon any of the bills drawn or indorsed by *Jones* in the name of the *Pen Van Coal Company*, and that they might be decreed to deliver up the bills to the Plaintiff, or otherwise to indemnify him against all actions and demands upon them.

The answer stated, that the Defendant, *Forman*, was not a partner in the former firm of *Homfray, Moggridge*, and Co.; denied knowledge or belief that the Plaintiff had retired from the *Pen Van Coal Company* in *July* 1814; stated, that a demand of the amount of the bills from the Plaintiff was made in *November* and *December* 1815, and an action commenced by the Defendants in *March* 1816; denied knowledge or belief in themselves or *W. Fothergill* that the bills were drawn or indorsed for any purposes unconnected with the Coal Company; the Defendants having been informed by *Jones*, and believing that they were drawn for the purposes of the Company,

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Company, and that all the money advanced on them was applied for those purposes.

The answer also denied, that, at the time of discounting the bills, the Defendants had notice that the Plaintiff had retired from the partnership; admitted letters received by *William Fothergill* from the Plaintiff in *April* 1812, requesting that *Homfray, Moggridge*, and Co. would neither pay nor discount any bills on account of the *Pen Van Coal Company*, without previous advice to him; but stated, that the Defendants were first informed of such letters in *January* or *February* 1815; and that about *Christmas* 1812, *Jones* assured *William Fothergill*, that he had remonstrated with the Plaintiff on the subject of the notice, and had satisfied him that the *Pen Van Coal Company* could not go on without discounts, and that the Plaintiff had authorised him to communicate that to *William Fothergill*.

The Plaintiff now showed cause against dissolving the injunction which had been obtained for want of answer.

The *Solicitor-General* and Mr. *Wilbraham*, in support of the injunction.

On the merits, the Defendants are not entitled to recover from the Plaintiff the amount of bills of exchange accepted in the partnership name, by a person with whom he had ceased to be a partner, and after express notice to the Defendants, that the Plaintiff would not be responsible for such bills. Lord *Galloway* v. *Mathew*. (a)

The judgment at law was recovered by default; the action having been commenced in *March* 1815, the judgment was signed in the same month. However re-

(a) 10 *East*, 264.

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luctant a court of equity may be to interfere after a verdict, yet, where the justice of the case is clear, and the merits have not been examined at law, nor submitted to the opinion of a jury, relief will not be denied. On that point, the *dicta* of Sir *Joseph Jekyll*, in the *Countess of Gainsborough* v. *Gifford* (a), are express.

Sir *Samuel Romilly* and Mr. *Treslove*, against the motion.

Where a party has no defence to an action on a bill of exchange, except from circumstances in the knowledge of the Plaintiff at law, this Court will not entertain a bill for discovery after judgment. In *Manning* v. *Mestaer*, in which Lord *Eldon* and Sir *Samuel Romilly* were counsel, (precisely analogous to the present case,) the Plaintiff in equity alleged, that circumstances in the knowlege of the Defendant in equity would have afforded a defence; but Lord *Thurlow* decided that there having been judgment at law, this Court would not interfere. If the judgment in this case were by default, of which no evidence is produced, it would still be most mischievous, and contrary to the practice, to permit the Defendant to obtain an examination on interrogatories in this Court.

It is, at least, extremely doubtful whether at law a partner can protect himself, as this Plaintiff seeks, against liability on the securities in the partnership name.

The LORD CHANCELLOR.

This is a case of great importance to the practice of the Court. It is stated that here is an accidental and unfortunate judgment by default; but that judgment was suffered by default is shown in such a way that I cannot

(a) 2 *P. W.* 424.

take

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take much notice of it. No circumstances are confessed in the answer, or in any way established, from which it can be collected that the judgment was not deliberate. If a Defendant has a good legal defence, but the matter has not been tried at law, it becomes a very serious question, whether a party, who, being competent, does not choose to defend himself at law, can come into equity, and change the jurisdiction. Consider the effect of that: he might not have succeeded in his defence at law; but, by coming into equity, he secures so much additional time.

The case of the Countess of *Gainsborough* v. *Gifford* (*a*) proves nothing, except from the *dicta* of Sir *Joseph Jekyll*; because the party who brought the action for the price of the shares, not having deducted from the sum which the Countess was to pay, the money for which he had sold them, it was clear that she was intitled to be relieved from so much of the amount which he had recovered at law.

Sir *Joseph Jekyll* says, — "I agree the Court ought to be very tender how they help any Defendant after a trial at law, in a matter where such Defendant had an opportunity to defend himself. But still such cases there are, in which equity will relieve after a verdict, in a matter where the Defendant at law might properly have defended himself: as, if the Plaintiff at law recovers a debt against the Defendant, and the Defendant afterwards finds a receipt, under the Plaintiff's own hand, for the very money in question. Here the Plaintiff recovered a verdict against conscience, and though the receipt were in the Defendant's own custody, yet he not being then apprised of it, seems entitled to the aid of equity, it being against conscience that the Plaintiff should be twice paid the

(*a*) 2 *P W*. 424.

same

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same debt; so if the Plaintiff's own book appeared to be crossed, and the money paid before the action brought." (a)

Sir *Joseph Jekyll* here takes, as a circumstance, that the Defendant at law was not apprised that he had such a receipt in his custody; even if given to himself, he might not be apprised that it was in his custody, but he must have known that it had been given; and then the question would have been, whether he should not have filed a bill praying an injunction till discovery, and then have gone to law? That would have been so, unless the Defendant at law was not himself the person who paid the money, but represented some one by whom it was paid; in which case the fact would not be in his own knowledge. (b)

I have some recollection, and may find a note, of *Manning* v. *Mestaer*. Lord *Thurlow* was very tenacious of the doctrine, that a party who had an opportunity of trial at law; and would not avail himself of it, could not come here. If the Court would allow that in any case, at least the case should be extremely clear. Where a question depends on papers the existence of which the Defendant at law knew, and by which he might have explained the fact, that perhaps is not so clear a case, that the Court will interfere.

(a) 2 *P. W.* 425.

(b) "*Desborough* v. *Adlard*, *February* 24. 26 *Car.* 2. 167¾. The Plaintiff exhibited a bill to be relieved against a verdict and judgment at law, obtained against him upon a plea of *n'ungs exor.* which was dismissed, because this plea must needs be contrary to his own knowledge."—Lord *Nottingham*'s MSS.

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The case having been again mentioned, the Lord Chancellor intimated that he remained of opinion that the question was legal; that the Plaintiff had shown no title to relief in equity, and that he could not have succeeded at law.

May 24.

The LORD CHANCELLOR.

I have read the papers again, and my decided opinion is, that the injunction must be dissolved.

Injunction dissolved. (*a*)

Reg. Lib. B. 1818, fol. 1164.

Injunction to stay execution, or sale under execution; when granted.

(*a*) See *Snowball* v. *Vicaris*, *Bunb.* 175. *Hankey* v. *Vernon*, 2 *Cox*, 12. *Chennel* v. *Churchman*, 3 *Bro. C. C.* 16 *n.* *Withal* v. *Liley*, *Forr.* 94. *Kensington* v. *White*, 3 *Price*, 169. *Whitmore* v. *Thornton*, 3 *Price*, 231. *Field* v. *Beaumont*, *ante*, vol. 1. 204. "In *Rowe* v. *Wood*, *Michaelmas* 1816, the Lord Chancellor said, In general an injunction is never granted to stay execution, except for want of appearance or answer; the parties ought to have applied sooner, and it would be extremely mischievous to grant the writ in favour of persons who have lain by so long. An injunction is not granted to stay the sheriff from selling property taken under an execution, unless it had been previously obtained against the Defendant to stay execution; and the sheriff thus enjoined must sell under subsequent executions, unless the Plaintiff will indemnify him. In a special case, an injunction to stay execution has been obtained on affidavit, as where a warrant of attorney had been obtained by fraud.

Mr. *Bell* mentioned a case of *Mootham* v. *Waskett*, in which a warrant of attorney having been fraudulently obtained, execution was stayed by injunction." From Mr. *Merivale*'s Notes; and see 2 *Maddock*, Principles and Practice of Chancery, 131. 132. *Lord Courteney* v. *Godschall*, 9 *Ves.* 473. *Annesley* v. *Rookes*, 3 *Mer.* 226. *n.*

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May 23.

A lessee for years determinable on lives, having paid an advanced rent during a dispute whether the last *cestui que vie*, who had been many years absent from the realm, was alive, and a demand of a farther advanced rent being made by the lessor, on a bill by the tenant to recover those payments, a commission to examine witnesses to prove the *cestui que vie* still living was issued, the plaintiff paying into court the arrears and accruing payments of the advanced rent, which he had been accustomed to pay.

THE bill stated, that by a lease of the 1st of *June* 1768, Lady *Stourton* demised to *C. Haddock*, her executors, &c., an estate in the county of *Lancaster*, for ninety-nine years, if *John Aspinal* of *Darwen*, then aged sixty years, *William Aspinal* of *Blackburn*, then aged eighteen years, and *John Aspinal* of *Salenbury*, then aged fifty years, or any of them, should so long live, subject to a yearly rent of 1*l.*; that the term became vested, on the 3d of *November* 1784, in *Henry Brown*, and, after his death, in *March* 1815, in the Plaintiffs; the reversion, subject to the term, being vested in *George Petre*, the Defendant; that *John Aspinal* of *Darwen* died in 1785, and *John Aspinal* of *Salenbury*, in 1782, and *William Aspinal* was, at the Spring assizes for the county of *Lancaster*, in 1787, convicted of stealing, and sentenced to transportation for fourteen years, and was accordingly transported to *New South Wales*, and had ever since been resident in that colony; that in 1795, *J. Harper*, receiver of the rents of the late Lord *Petre*, in whom the reversion of the premises was then vested, represented to *Henry Brown* that, by the statute 19 Car. 2. c. 6. Lord *Petre* was entitled to the possession of the estate, *William Aspinal* not having been in *England* for many years, and that *Brown* would be dispossessed, unless he agreed to pay to Lord *Petre* twenty guineas a-year; that *Brown*, being ignorant of the law, and not having any evidence that *William Aspinal* was then living, paid twenty guineas a-year for the premises, during about ten years, when *Harper* insisted that he should pay forty guineas a-year; and *Brown*, not being able to prove the life of *William Aspinal*, paid one half year's rent at that rate; but finding then that *William Aspinal* was alive, refused to make any further payments: that it appeared by the

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register kept at the office of the Secretary of State, that, at the last muster, made in *August* 1806, *William Aspinal* was living in *New South Wales*, as a free British settler, and, from the statement of persons arrived from that place, that he continued living in 1808.

The bill then stated correspondence between the solicitors of the parties, containing various proposals for ascertaining the sum to be paid by *Brown*, on account of rent of the premises, since *Michaelmas* 1805, (the Defendant claiming 40*l.* *per annum*, to 1810, and, from that time, 79*l.* 10*s.* *per annum*,) but without effecting any conclusive arrangement.

The bill, alleging the death of *Henry Brown*, in 1815, that the Plaintiffs were his administrators with the will annexed, and that it appeared, by a certificate of persons resident in *New South Wales*, dated the 13th of *March* 1816, that *William Aspinal* was then alive, prayed an account of the sums of money which the Defendant, or any person by his order, &c. had received from *Henry Brown*, on account of rents of the premises by virtue of the lease, and that he might be decreed to pay what should appear due, and that the Plaintiffs might be declared entitled to remain in quiet and peaceable possession of the premises, at the rent specified in the lease, for the residue of the term, if *William Aspinal* should so long live, and that the Plaintiffs might have a commission or commissions for the examination of witnesses in *New South Wales*, and elsewhere, beyond the seas, to prove, that the *William Aspinal* who was living in *New South Wales* is still living, and that he is the *William Aspinal* named in the lease.

The Defendant, by his answer, insisted, that there was no regular authenticated document to prove, that the *William*

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William Aspinal living in *New South Wales* is the nominee in the lease; and that under the statute 19 *Car.* 2. c. 6. he was entitled to the possession of the premises, and claimed the like benefit at the hearing of the cause, as if he had pleaded the statute in bar.

Sir *Samuel Romilly* and Mr. *Dowdeswell* having, on a former day, in behalf of the Plaintiff, moved for a commission to examine witnesses, on affidavits of the identity of the nominee in the lease, and *William Aspinal* resident in *New South Wales*, the Lord Chancellor now gave judgment.

The LORD CHANCELLOR.

On this application, the question is, whether a commission should be issued for the examination of witnesses to ascertain, whether a person who was some years ago transported to *New South Wales*, and lately living there, is still alive, and if the commission should be issued, on what terms? That a commission must be issued, it is impossible to doubt. The statute (*a*) declares, that if persons for whose lives estates have been granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient proof be made of their lives, in any action commenced for recovery of such tenements by the lessors or reversioners, they shall be accounted dead, and the judge shall direct the jury to give their verdict accordingly. It seems to me, that both at law and in equity, where it is necessary to produce sufficient proof, that the *cestui que vie* is alive, the party would be entitled to obtain that proof by the means open to every other Defendant, and in course by a commission for the examination of witnesses. The statute also provides (*b*), that

(*a*) 19 *Car.* 2. c. 6. s. 2.

(*b*) Sect. 4. 5.

 if

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if there is an eviction of the tenement by virtue of the act, and it afterwards appears in proof, that the *cestui que vie* was living at the time of the eviction, the persons entitled to the estate, while his life subsists, may, by the means prescribed, recover the profits of the land during their dispossession; and that, whether the action is brought during the life of the *cestui que vie*, or after his death.

This case presents the peculiarity that, at a particular period, when the parties differed on the fact, whether *Aspinal* was living or dead, they came to an agreement by which the rent was raised from twenty shillings to twenty guineas, and, at a subsequent period, from twenty guineas to 42*l*. If the *cestui que vie* is alive, in justice, the estate ought to have been held at the rent reserved; but a difficulty in recovering the amount paid beyond that rent will be created by the dispute whether he was living; and it seems fair that the Plaintiff should continue to pay the 42*l*. *per annum* (not 79*l*. 10*s*.) which he has been accustomed to pay, without prejudice to the question, whether he should not be relieved against so much of the payment as is additional to the rent reserved. On that point the question will be, whether it can be recovered as paid by mistake; it may be represented to have been paid by agreement, under a doubt whether the *cestui que vie* was alive or dead.

"His Lordship doth order, that the Plaintiffs be at liberty to sue out a commission for the examination of witnesses in *New South Wales*, to prove whether *William Aspinal*, named in the indenture in the pleadings of this cause mentioned, is still living or dead, and, if dead, when he died; and the Defendants are, in six days after notice thereof, to join and strike commissioners' names with the Plaintiffs' clerk in Court, or, in default thereof, the Plaintiffs are to be at liberty to take out such commission

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mission directed to their own commissioners; and it is ordered, that the Plaintiffs do pay the sum of 262*l.* 10*s.*, being the amount of the rents of the premises in question, at the rate of 21*l.* *per annum*, from *Michaelmas* day 1805 to *Lady* day 1818, into the bank, with the privity of the accountant-general, &c.; and it is ordered, that the said Plaintiffs do continue to pay the said rent of 21*l.* *per annum* from time to time into the bank, &c.; and it is ordered, that the Plaintiffs do give security to be approved, &c. for the payment of the farther sum of 21*l.* *per annum*, in case the said *William Aspinal* prove to be dead, from the time he so died; but this is to be without prejudice."

Reg. Lib. A. 1817, fol. 2133. (*a*)

(*a*) See *Holman* v. *Exton*, *Carth.* 246. *Ca. Temp. Holt*, 195. 6 *Ann.* c. 18. *Ex parte* Sir *John St. Aubyn*, 2 *Cox*, 373. *Ex parte Grant*, 6 *Ves.* 512. *Doe* v. *Deakin*, 4 *Barn. & Ald.* 433.

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May 23. 26. 28.

A reference to the master to inquire whether proceedings at law and in equity are for the same matter, stays all proceedings, without the special order of the Court, which will give or withhold leave to proceed, according to the circumstances of each case.

THE Defendant moved that the replication filed in this cause might be withdrawn, and the bill dismissed with costs for want of prosecution, and that the Plaintiff's, or the Defendant's clerk in Court, might pay the costs. The affidavit in support of the motion stated, that the Defendant's clerk in Court having informed his solicitor that no replication was filed on the 7th of *May*, an order of the Vice-Chancellor was obtained, dismissing the bill for want of prosecution; that from the refusal of the Defendant's clerk in Court to procure the usual six clerks' certificate, on the ground that no notice had been given to the Plaintiff of the Defendant's intention to move to dismiss, the order could not be

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drawn up; and that, on the 9th of *May*, a replication was filed.

At the same time, the Plaintiff had given notice of a motion for leave to withdraw the replication and amend the bill, not requiring any farther answer, and undertaking to file the replication again forthwith. The affidavit in support of that motion stated, that the bill was filed to compel specific performance of an agreement; that the Defendant refusing to pay rent, and the Plaintiff having proceeded to recover it at law, an inquiry before the Master was directed, whether the Plaintiff's proceedings at law and in equity were for the same matter, and the Master reporting in the negative, his report was confirmed; that a second reference to the Master for the same purpose had been since obtained by the Defendant, but the order had not been drawn up; and specified the intended amendment.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the Defendant's motion, insisted that the Defendant was entitled to move to dismiss the bill without giving notice, and that the replication filed after the order was pronounced, though before it had been drawn up, was too late. The *Attorney-General* v. *Finch* (*a*). In no instance has a Plaintiff been permitted to withdraw, for the purpose of amendment, a replication filed to prevent the dismissal of the bill.

Mr. *Heald*, against the Defendant's, and in support of the Plaintiff's, motion.

The case cited is not applicable to the present question; the reference to the Master to inquire whether

(*a*) 1 *Ves. & Bea.* 568. See *Reynolds* v. *Nelson*, 5 *Mad.* 60. *Lorimer* v. *Lorimer*, 1 *Jac. & Walk.* 284.

the

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the proceedings at law and in this Court are for the same matter, suspends all proceedings till the report. In *Mousley* v. *Basnett*, stated in a note to *Boyd* v. *Heinzelman* (a), the order expressly reserved to the Plaintiff liberty to proceed pending the reference; and in *Mills* v. *Fry* (b), your Lordship states, that without such reservation all proceedings are stayed. The Defendant having thus prevented the Plaintiff from proceeding either at law or in equity, clandestinely instructs counsel to move the dismission of the bill for want of prosecution. The replication ought not to have been filed; it was unnecessary as well as irregular.

Sir *Samuel Romilly*, in reply.

The Defendants, in *April*, gave notice of a motion for a reference to the Master to approve a lease; a sufficient proof that they did not consider proceedings stayed. It has been understood, that the order stays the proceedings at law, but not in equity.

The LORD CHANCELLOR.

It would not be difficult, in the particular circumstances of this case, to dispose of it; but it is important to settle the practice of the Court, and for that purpose I wish the register to make inquiry, and certify the result.

The opinion which I expressed in *Mills* v. *Fry*, (which seems scarcely supported by *Mousley* v. *Basnett*,) proceeded not only on the communication of the register, but on the consideration of a difficulty that has often occurred to me, and which induces me to doubt whether

(a) 1 *Ves. & Bea.* 381.
(b) 3 *Ves. & Bea.* 9.

there

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there is any general rule on the subject. Suppose an action brought on the Northern Circuit in *Michaelmas* term, and a bill filed in the same term, and the common order for a reference, alleging that the Plaintiff proceeds for the same matter at law and in equity; in such a case, I do not think it wholesome that proceedings should be stayed; because, in all probability, the report of the Master would be obtained long before any thing effectual could be done at law; but if the Master reports that the proceedings were for the same matter, and the Plaintiff afterward chuses to proceed in equity, the Court would direct him to pay the costs of the proceedings at law. Suppose an action to be tried between *Easter* and *Trinity* term, and a bill filed when the parties were going to trial; unless the Master's report could be obtained within the first four days of the next term, before the question was decided, execution might be taken. The terms of the order in *Mousley* v. *Basnett*, allow the Plaintiff to proceed at law without any restraint; if the order is so drawn, regard being had to the period at which the action was commenced and the bill filed, execution might issue before the question could be decided. I doubt, therefore, whether there is a general rule; but if the register, on examination, finds, that it has been the constant course to stay the proceedings at law and not in equity, that established practice would be more satisfactory than any opinion of my own.

Mr. *Heald*. The mischief suggested arises from the delay of the party in not filing the bill sooner.

The LORD CHANCELLOR.

If the party is early in one Court and late in the other, all the inconvenience is that of which he is the author.

I

I abide by the authority of the *Attorney-General* v. *Finch*, but it is not applicable to this case, which depends on its circumstances. I think it not necessary to obtain the six clerks' certificate before the motion to dismiss. I am satisfied that, by the practice of the Court, it is enough to produce the certificate on applying to have the order drawn up. The clerk in Court should not have refused to procure the certificate, but it would be impossible for the Court to suffer the Plaintiff to take advantage of a slip in the conduct of an officer of the Court. Whatever may be the certificate of the register, this case must be decided on its circumstances, and with reference to the fact, that the matter was in a situation in which it was very difficult for any one to know how to deal with it.

The LORD CHANCELLOR.

May 26. On a search in the register's office, the result of which has been communicated to me, the general rule appears to be, that the Plaintiff is not at liberty, after an order for election, to proceed either at law or in equity; but the Court, in the particular circumstances of each case, will give liberty to proceed, as those particular circumstances require; and accordingly, in some of the orders, the party has been allowed to proceed, in others, he has been directed to give judgment, with an express restraint against taking out execution. There is no case in which the Court would not modify the rule according to circumstances.

May 28. The Lord Chancellor intimated, that, under the circumstances of the case, considering the difficulty in the proceedings at law and in equity, the cause ought to be reinstated; and that without express permission to proceed,

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ceed, which, in special circumstances, the Court would give, the order to elect stays proceedings at law. (*a*)

(*a*) See *Mills* v. *Fry*, 19 *Ves.* 277. *Coop.* 107. *Anon.* 2 *Madd.* 395. *Browne* v. *Poynter*, 3 *Madd.* 24. *Coupland* v. *Bradock*, 5 *Madd.* 14. *Hogue* v. *Curtis*, 1 *Jac. & Walk.* 449. In *Barker* v. *Dumaresque*, 2 *Atk.* 119 *Barnard. Rep.* in *Cha.* 277. Lord *Hardwicke* "gave the Plaintiff leave to make a special election, viz. to proceed at law to recover judgment with a stay of execution, and likewise to proceed in this court for a discovery and an account of assets."

ROLLS.
June 15. 16. 17.

GARRARD *v.* GRINLING.

Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted.

THE bill stated written articles of agreement, dated the 24th of *November* 1807, by which the Defendant agreed to let to the Plaintiff a dwelling-house, malthouse, and twenty-five acres of land, for twenty-one years, from the 11th of *October* preceding, at an annual rent of 88*l.*; and the Plaintiff agreed to pay the property-tax during the term, to provide straw for thatching the buildings, to keep the gates, stiles, barns, and bridges, in repair, (the Defendant finding rough wood for that purpose, and repairing the buildings), and to take all the live and dead stock, which the Defendant should think fit to leave, at a fair valuation by two impartial persons, and all the barley at the price at which the Defendant bought it, and to keep the malt mill in repair, the stone excepted.

The bill filed on the 22d of *November*, 1809, prayed the specific performance of the agreement, and compensation for the time which had elapsed since the lease ought to have been granted.

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The answer of the Defendant stated, that the written agreement did not contain all the terms upon which the lease was to be granted; the Defendant having stipulated that five hundred coombs of malt should be made yearly during the term by the Plaintiff, and that the lease should contain a covenant on the part of the Plaintiff, not to assign the premises without the consent of the Defendant, and proper covenants for farming the lands: that the Plaintiff prepared the agreement stated in the bill, and brought it to the Defendant for his signature, who, having attempted to read it, but not being able to make it out, observed to the Plaintiff and his brother *John Garrard*, who was then present, that he supposed he should find it right; to which the Plaintiff and his brother replied, that it certainly was: and the Defendant, not supposing that the agreement was prepared in any manner different from the terms stipulated, and confiding in the assurances of the Plaintiff and his brother, that he would find it right, was induced to sign it, without having read, or shown it to any person, on his behalf; but that the Defendant would not have executed any agreement for letting the premises, if he had not understood that proper covenants, to the effect stated in the answer, were to be introduced into the lease.

John Garrard, the brother of the Plaintiff, deposed, that on the 23d of *November*, 1807, the Defendant proposed to let the premises to the Plaintiff, at a rent of 86*l.*, and, on the terms specified in the written agreement, as to taking the stock and repairs, the Plaintiff undertaking to make annually seven hundred coombs of malt; that the Plaintiff and the witness agreed to those terms, except as to the quantity of malt to be made, in lieu of which it was proposed by the Plaintiff to undertake to make annually five hundred coombs only, to which the Defendant assented; and also except as to the rent of 86*l.*,

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in lieu of which the Plaintiff proposed to pay 84*l.* only, which the Defendant refused to accept; that, on the following day, the Plaintiff having resolved to accept the proposal, with the alteration of the quantity of malt, from seven hundred to five hundred coombs, the witness reduced the proposal to writing, in the form of an agreement; and, on the same day, went with the Plaintiff to the house of the Defendant, for the purpose of completing the same, when the Defendant required 88*l.* *per annum* rent, instead of 86*l.*: that the Plaintiff expressed himself willing to give 86*l.*, and the witness informed the Defendant that he had prepared an agreement according to the terms mentioned the evening before; and, in the expectation that the Defendant would accept 86*l.*, interlined the word *six* after the word *eighty*, and then delivered the agreement to the Defendant for his perusal, who accordingly read the same over from the beginning to the reservation of the rent, to which he objected, and wrote the word *eight* over the word *six*; that the witness remonstrated with him for so doing, but the Defendant positively refused to make any further alteration in the rent, and continued to read the agreement for two or three lines further, when he gave it to the witness, and requested him to read it; that the witness read the whole agreement from the beginning to the end, distinctly and aloud, in the presence of the Plaintiff and Defendant, and of *Sophia Philpot*, the Defendant's housekeeper; upon which the Defendant expressed himself perfectly satisfied, and the agreement was signed by both parties, the Defendant observing to the Plaintiff, that if any thing had been omitted respecting covenants, or any thing which they had talked over the day before, he supposed it would be agreeable to them to have it inserted in the lease, to which the Plaintiff and the witness assented, saying, that they did not desire to have the lands without proper covenants; and the Defendant proposing that the

the agreement should be left in the hands of the witness, on behalf of both parties, he immediately took possession of it.

Sophia Philpot deposed, that the last witness read, as part of the agreement, a clause requiring five hundred coombs of malt, to be made annually on the premises; and that, in the conversation preceding the signature of the agreement, it was stipulated that the Plaintiff should not assign the lease without the consent of the Defendant.

Mr. *Hart* and Mr. *Roupell*, for the Plaintiff.

The written agreement, which it appears was read to the Defendant, and in which he introduced an addition to the rent, is the actual contract, and supersedes all previous proposals. There is no evidence that the written agreement varies from the intention of the parties; the covenant against assignment never formed a term of the contract; and the covenant to use the malt-house is included, without express stipulation, as an usual covenant, according to the custom of the country.

Mr. *Bell*, Mr. *Wetherell*, and Mr. *Pepys*, for the Defendant.

The bill, seeking the specific performance of an agreement different from that which the parties intended, must be dismissed. The *Marquess Townshend* v. *Stangroom* (*a*), *Woollam* v. *Hearn* (*b*), *Higginson* v. *Clowes* (*c*) A covenant for making a certain quantity of malt, is not within the principles established in *Church* v. *Brown* (*d*), a usual covenant.

(*a*) 6 *Ves.* 328.

(*b*) 7 *Ves.* 311.

(*c*) 15 *Ves.* 516. 1 *Ves. & Bea.* 524., and see *Clarke* v. *Grant*, 14. *Ves.* 519. *Kennedy* v. *Lee*, 3 *Mer.* 441.

(*d*) 15 *Ves.* 258.

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On reading the pleadings and the evidence, I am of opinion that the Plaintiff has not established a case for the specific performance which he prays. It is incumbent on the Plaintiff, in such a suit, to satisfy the Court that he is entitled to specific performance of the very agreement stated in the bill; insisting on a written contract, the question must be, is that written contract conformable to the actual contract? It is certainly competent to the Defendant to show, that by fraud, or mistake, or otherwise, the written contract and the actual contract differ; and it is established by the evidence on the part of the Plaintiff, that such is the fact in this case.

Without imputing fraud to the Plaintiff, it appears that by some inadvertence, this written contract has not included the terms on which the parties had agreed. It was a part of the agreement on the 23d of *November*, that the Plaintiff, if he took the malt-house, should make annually five hundred coombs of malt; a fact not disputed on the part of the Plaintiff, but proved by his brother. On the 24th of *November*, the parties having previously adjusted all points except the amount of rent, the Plaintiff is willing to accede to the Defendant's terms in that article, and a written contract is prepared by the Plaintiff. That contract, detailing in particular many of the terms that are to constitute the covenants to be contained in the lease, specifying payment of the property tax, repairs, and a valuation of the stock, yet wholly omits that which appears to have been the subject of discussion at the moment of drawing it, the five hundred coombs of malt.

It is insisted, that the omission is immaterial, because the agreement contemplated a future lease, which would

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would include all proper covenants, and that it is neither necessary nor usual in executory contracts, to enumerate all the covenants to be inserted in a lease. If the covenant relative to five hundred coombs of malt falls within the description of a usual covenant, it required no specification, but was incidental to the contract, and implicitly included in it. But can such a covenant be so described? It is not necessary to inquire particularly into the nature of usual covenants; the parties cannot ingraft on a contract specifying covenants in a future lease, any covenant which is not of that description. The written contract, if to be specifically executed, is the guide to the Master in approving a lease conformable to it; and this contract would clearly not authorise the insertion of a covenant for malting five hundred coombs; not an usual, but a peculiar, covenant, imposing a specific obligation on a party who without it would take the premises, unfettered by restriction in the use of them. The written agreement was brought by the Plaintiff for signature, not after a considerable interval, when he might have forgotten the previous stipulations, but at the instant; and while it specifies a number of covenants usual and proper, which it was not necessary to specify, totally omits those which had at that moment been the subject of discussion.

Without adverting to the question, whether the agreement was so read to the Defendant as to inform him that the covenant with regard to malt was not included, it is clear that the Defendant signed it under a representation, that if any of the terms of the real contract were omitted, they should be inserted in the lease. The Defendant seems afterwards to have objected to the transaction, and on the question, whether the lease ought to contain a covenant against assigning without the assent of the landlord, the witnesses differ. It does

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not appear that a new contract was ever concluded between the parties; the bill seeks performance of the written contract; and the single question is, whether, as the pleadings are framed, and with a bill insisting on the written as the actual agreement, the Court can decree performance of a contract, which it is clear on all hands is not the true, and compel the Defendant to execute a lease not providing the cautions which he imposed on the Plaintiff?

Without adverting to collateral matter, the probable motives of each party, it is enough to say, that on a bill for specific performance, when it is certain that the written is not the actual contract, when the Court must decree performance, if at all, with supplemental variations, establishing an agreement, the terms of which are some in writing, some parol, after a great lapse of time, and with compensation for the period expired, while the doubt depended, in such a case, the Plaintiff cannot be declared entitled to relief.

The bill must be dismissed, but without costs. The real subject of dispute was the restraint of assignment, and on that part of the case I am not perfectly satisfied. I shall follow the example of the late Master of the Rolls in *Woollam* v. *Herne*. (a)

Bill dismissed without costs.

Reg. Lib. A. 1817, fol. 2076.

(a) 7 *Ves.* 211.

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May 28.

A tenant for life without impeachment of waste, not restrained from felling trees fit for the purposes of timber, though young, and not such as would be felled in a course of husband-like management of the estate.

THE supplemental bill in this cause (*a*), filed on the 15th of *April* 1818, stated, that since the Defendant put in his answer to the original bill, he had marked for cutting a large quantity of timberlike trees, unfit to be cut as timber, or in a due course of cutting; and prayed, that the Defendant might be restrained from felling or cutting any timber or other trees on the estates in question, unfit to be cut or felled in a due course of cutting or felling, or not come to maturity and fit to be cut as timber.

The answer of the Defendant denied that he had marked any trees which were unfit to be cut as timber, or in due course of cutting.

On this day, the Plaintiff moved for an injunction to restrain the Defendant from cutting any timber or other trees or saplings standing on the lands mentioned in the pleadings, that are unfit to be cut or felled in a due and fair course of husbandry.

The affidavits in support of the motion (filed before the answer to the supplemental bill) stated, that the Defendant had marked for cutting every tree, however young, that could be sold; that if some of the oak trees marked should be cut, great waste would be committed, and irreparable loss ensue, and the saplings left would perish. According to the affidavits in reply, a very small proportion of the oak trees marked to be felled measured less than nine cubical feet, and no injury would ensue to the saplings or trees left, by felling those marked.

(*a*) Reported *ante*, vol. i. p. 252.

1818.

SMYTHE v. SMYTHE.

The *Solicitor-General*, and Mr. *Rose*, in support of the motion, cited the *Marquess* of *Downshire* v. *Lady Sandys* (*a*), and *Lord Tamworth* v. *Lord Ferrers*. (*b*)

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell*, against the motion.

The LORD CHANCELLOR.

A tenant for life, without impeachment of waste, is clearly not compellable to cut timber, in such way, as a tenant in fee would think most advantageous, but is entitled to cut down any thing that is timber. This motion requires an affidavit, pledging the deponent, that the trees about to be cut are not fit for timber. It is settled, that a tree, which a tenant in fee, acting in a husband-like manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life, unimpeachable of waste, might cut down all these trees, without question, at law; and to subject him, in this Court, to the rules which a tenant in fee might observe, for the purpose of husband-like cultivation, would deprive him of almost all his legal rights. If the trees are so far advanced as to become timber, the tenant may cut them down, though they are in a state to thrive, and though cutting them down would injure the saplings. It is not sufficient to state, that this is thriving wood; it must be thriving wood not fit for the purposes of timber. I cannot determine whether a tree, measuring less than nine cubic feet, is, or is not, fit for purposes of timber. If the Plaintiff files an affidavit, stating, that trees measuring less than nine cubic feet are not fit for purposes of timber, that must be met. In the cases referred to, the injunction restrained

(*a*) 6 *Ves*. 107. (*b*) 6 *Ves*. 419.

the

the tenant for life from cutting trees unfit to be cut *as timber.*

Injunction refused. (*a*)

(*a*) On the equitable rule which restrains a tenant for life without impeachment of waste from felling timber-trees unfit to be felled as timber, see Lord *Castleman* v. Lord *Craven*, 22 *Vin. Ab.* 523. 2 *Eq. Ca. Ab.* 758. *Obrien* v. *Obrien*, *Amb.* 107. *Perrot* v. *Perrot*, 3 *Atk.* 94. *Chamberlayne* v. *Dummer*, 2 *Dick.* 600. 1 *Bro. C. C.* 166., 3 *Bro. C. C.* 549. *Strathmore* v. *Bowes*, 2 *Bro. C. C* 88., 2 *Dick.* 673. 1 *Cox.* 263. *Marquess of Downshire* v. *Lady Sandys*, 6 *Ves.* 107. *Lord Tamworth* v. *Lord Ferrers*, 6 *Ves.* 419.

WILLIAMS *v.* WILLIAMS.

June 10.

A coach master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from *R.* to *London*, or prejudicial to the business which he had sold, an injunction was granted restraining him from running a coach from *P.* through *R.* to *London.*

THE bill stated, that, previously to *November* 1817, the Plaintiffs and the Defendant were concerned as partners in coaches running from *Reading* to *London*, and back; that by articles of agreement, dated the 4th of *November* 1817, the Defendant agreed to sell to one of the Plaintiffs his share in the business, with a condition, that he should not at any time after *November*, be in any manner concerned in any coach running from *Reading* to *London*, or from *London* to *Reading*, or in any other coach that might in any manner injure the business then carried on by the Plaintiffs; that the Defendant had lately begun to run a coach from *Pangbourne*, about six miles beyond *Reading*, to *London*, and from *London* to *Pangbourne*, passing through *Reading*, and running thoughout the same road as the coach of the Plaintiffs, to the great injury of their business. The

 bill

1818. Williams v. Williams.

bill prayed a specific performance of the agreement, and an injunction.

The allegations of the bill being verified by affidavit, Sir *Samuel Romilly* moved for an injunction.

"His Lordship doth order, that an injunction be awarded to restrain the Defendant, his servants and agents, from running any coach or coaches from *London* to *Reading*, and back again from *Reading* to *London*, as in the Plaintiff's bill mentioned, until answer and farther order."

Reg. Lib. B. 1817, fol. 1035. (*a*)

(*a*) It has been long settled, that covenants restraining the exercise of a trade in a *particular place*, as contradistinguished from covenants in general restraint of trade, are valid, *Mitchel* v. *Reynolds*, (which collects the earlier authorities) 1 *P. W.* 181. 10 *Mod.* 27. 85. 130. *Fort.* 296. *Chesman* v. *Mainby*, *Fort.* 297. 2 *Str.* 739. 2 Lord *Raym.* 1456. 1 *Bro. P. C. Ed. Toml.* 234. *Colmer* v. *Clark*, 7 *Mod.* 230. under the name of *Clerke* v. *Comer*, *Lee Rep. Temp. Hardwicke*, 53. *Davis* v. *Mason*, 5 *T. R.* 118. *Bunn* v. *Guy*, 4 *East*, 190. *Gale* v. *Reed*, 8 *East*, 80., and a Court of Equity will compel the specific performance, and enjoin against the violation, of such covenants, *Harrison* v. *Gardner*, 2 *Madd.* 198. *Williams* v. *Williams*, *supra*. *Shackle* v. *Baker*, 14 *Ves.* 468. *Cruttwell* v. *Lye*, 17 *Ves.* 335. See *Hardy* v. *Martin*, 4 *Bro. C. C.* 419. n. 1 *Cox.* 26. *Barrett* v. *Blagrave*, 5 *Ves.* 555. 6 *Ves.* 104. *Bozon* v. *Farlow*, 1 *Mer.* 459. But the mere sale of the good will of a trade, imposes no obligation on the vendor to forbear the exercise of the same trade. *Shackle* v. *Baker*, *Cruttwell* v. *Lye*, *Kennedy* v. *Lee*, 3 *Mer.* 441., nor it seems will Courts of Equity execute a contract for the sale of good will. *Baxter* v. *Conolly*, 1 *Jac. & Walk.* 576.

1818.

June 20.

JOB *v.* BARKER.

After a reference to the master of exceptions to an answer, an order for leave to amend, and that the defendant might answer the exceptions and amendments at the same time, obtained before the report, on the allegation that the master had allowed some of the exceptions, discharged with costs.

THE Plaintiffs having amended their bill after answer, took exceptions to the answer to the amended bill, to which the Defendant submitted, and put in a farther answer, and, on the 30th of *May*, the Plaintiffs obtained a reference to the Master to look into the Plaintiffs' amended bill, and the Defendant's answer, and farther answer, and the exceptions taken to the former answer, and certify whether the answers were sufficient in the points excepted to. The Master was attended on the exceptions, but before he had made his report, the Plaintiffs, on the 3d of *June*, obtained an order, alleging that the Master had allowed one or more of the exceptions, to amend the bill, and that the Defendant might answer the exceptions so allowed by the Master, and the amendments at the same time. The Defendant now moved to discharge that order for irregularity.

Mr. *Shadwell*, for the motion.

Mr. *Agar*, against it.

The LORD CHANCELLOR.

The order obtained was against all practice: the petition, that the Defendant may answer the amendments and exceptions at the same time, ought to state, that the Master has made his report, and certified the answer to be insufficient.

Order discharged with costs.

Reg. Lib. A. 1817, fol. 1250.

1818.

June 22. 24.

POSTLETHWAITE v. BLYTHE.

Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the Court will not direct a release upon payment into court of the largest sum to which the debt can in probability amount; the incumbrancer being entitled to retain the security till the debt is discharged.

ESTATES in *Jamaica* having been conveyed to trustees, in trust, *inter alia*, to raise money for the payment of a debt due to the Plaintiff, the bill in this cause was filed to compel payment. By their answer, the Defendants the trustees disputed the amount of the Plaintiffs' claim, and having paid into Court a sum of 2661*l.* 2*s.* 3*d.*, they moved before the Vice Chancellor, that upon payment into Court of the farther sum of 4034*l.* 11*s.* (amounting with the former sum to 6695*l.* 13*s.* 3*d.*, the utmost extent of the debt claimed) the Plaintiff might release the estates. The Vice Chancellor made the order, on payment into Court of an additional sum for securing the Plaintiffs' costs. (*a*)

On this day, the Plaintiff moved to discharge the Vice Chancellor's order.

Mr. *Bell* and Mr. *Heald*, for the motion.

An incumbrancer cannot be compelled to release the estate before he has actually received his debt. In no instance has the Court directed a creditor who contracted for real security, to accept the security of stock.

The *Solicitor-General* and Mr. *Maddock*, against the motion.

The amount due to the Plaintiff can be ascertained only upon taking a long account; the Defendants are ready to make any further payment into Court necessary as a provision against the depreciation of stock, and for securing the largest sum to which the Plaintiff can by

(*a*) *Postlethwaite* v. *Blythe*, 3 *Madd.* 242.

possibility

possibility be entitled; but the Court will not sanction the injustice of confining estates worth 70,000*l.*, pending the investigation of a claim which cannot exceed a tenth part of that sum.

The LORD CHANCELLOR.

This order supposes the possibility, that the fund paid into Court may be deficient to satisfy the mortgagee, and then requires him to accept for that deficiency the personal security of the trustees; is it not too clear for argument, that such an order is wrong in principle?

The rules of the Court with regard to mortgagees have been strongly impressed on my mind by the conduct of two distinguished practitioners. Mr. *Lloyd* constantly protested, that he never would, on the part of a mortgagee, consent to a sale; and the late Mr. *Maddocks*, who was himself a mortgagee for 20,000*l.* on a *Welsh* estate, refused his concurrence in a sale, to the great dissatisfaction of Lord *Thurlow*. They both maintained, one on behalf of his client, the other of himself, that the mortgagee was entitled, before he relinquished the estate, to have the money, not in the hands of the accountant-general, but in his own. It was not till a late period that it was contended that a mortgagor was bound to show his mortgage-deeds to a person contracting for the purchase of the estate. (*a*) The mortgagor is entitled to say to the intended purchaser, that if he choose to take his chance of title, he may, on payment of the mortgage-money, have a conveyance. The general doctrine of the Court is, that if the party claiming to redeem will take the mortgagee's word for the sum due, and will pay it, the mortgagee must convey; but when the mortgagee states a certain sum to be

(*a*) See *Anon. Mos.* 246.

due,

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POSTLETHWAITE v. BLYTHE.

due, the Court will not order him to re-convey on payment of that sum into Court; placing him in this situation, that if that sum is more than sufficient to satisfy his demand, he shall not have the surplus, if not sufficient, he shall have only personal security for the difference.

This case seems to me within these general principles; but I will examine the papers.

June 24.

The LORD CHANCELLOR.

I take it to be contrary to the whole course of proceeding in this Court, to compel a creditor to part with his security till he has received his money. Nothing but consent can authorise me to take the estate from the Plaintiff before payment.

Order discharged.

June 22.

BOWDEN *v.* HODGE.

On a bill for discovery, and a commission to examine witnesses abroad, in aid of the defence to an action, the plaintiff, having obtained the common injunction for want of an answer, was held entitled to a commission, and to extend the injunction to stay trial.

THE bill prayed, that one or more commission or commissions might be issued for the examination of witnesses at *Riga*, *Lubec*, *Hamburgh*, and elsewhere beyond the seas, as to the several matters in the bill mentioned, and that the Plaintiffs might be at liberty to make use of the depositions of such witnesses upon the trial of the action commenced by the Defendant, and in the mean time, that the Defendant might be restrained by injunction from proceeding in the action.

On the 27th of *May* 1818, an injunction was granted, restraining proceedings at law till answer and farther order;

order; but the Defendant was in the mean time to call for a plea, and proceed to trial thereon, and for want of a plea to enter up judgment; but execution was stayed.

On the 8th of *June*, the Plaintiffs moved before the Vice Chancellor, that a commission might be issued for the examination of witnesses at *Riga*, *Lubec*, and *Hamburgh*, and that the injunction might be extended to stay trial. The affidavit of the Plaintiffs in support of the motion stated, that in *January* or *February* 1817, *M. J. Haller*, of *Hamburgh*, consigned to the Plaintiffs a quantity of linseed for sale on his account; that the seed was contained in barrels commonly used for that purpose, and duly branded with the official mark, denoting that the seed was grown in 1816; that the seed was shipped at *Riga*, examined, and re-shipped, at *Lubec* and *Hamburgh*, and accompanied by certificates from each of those places of its growth, examination, and shipment without alteration; that soon after the arrival of the seed at *Hull*, in *March* 1817, *H. Ross* applied to the Plaintiffs, on behalf of the Defendant, to purchase a part of it, and went to the warehouse where it was deposited, and after examining the state of several of the barrels, as agent of the Defendant, entered into a contract with the Plaintiffs for the purchase of two hundred and ninety-seven barrels, at two guineas a barrel, and wrote and delivered a bought note, describing the seed as "new *Riga* sowing linseed, crop 1816;" that one hundred and ninety-seven barrels having been delivered to the Defendant, who paid for them the price stipulated, he soon afterwards applied to the Plaintiffs for an allowance, alleging, that the seed did not correspond to the description in the note; but the Plaintiffs believing the seed to be such as described, refused to comply with his demand, and in *Michaelmas* term, 1817, the Defendant

commenced

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BOWDEN. v. HODGE.

commenced an action in the Court of Exchequer against the Plaintiffs, to recover damages, on the ground, that the linseed was not of the crop of 1816, but of bad quality and unfit for sowing; that the Defendant's solicitors refused to consent to a commission for the examination of witnesses abroad; that the Plaintiffs were advised, that they could not safely proceed to trial without the testimony of persons resident in *Riga*, *Lubec*, and *Hamburgh*, or elsewhere abroad; and that they had reason to expect and believe that they should procure, if they were allowed a commission for that purpose, such evidence as would enable them to make a good defence.

The following order was made: — "This Court doth order, that one or more commission or commissions issue out of, and under the seal of, this Court, for the examination of the Plaintiff's witnesses, at *Riga*, *Lubec*, and *Hamburgh*, returnable without delay; and, it is ordered, that the Defendant's clerk in Court do, within four days after notice given, join and strike commissioners' names with the Plaintiff's clerk in Court, or, in default thereof, that the Plaintiffs be at liberty to sue out such commission directed to his own commissioners; and the Plaintiffs are also to be at liberty to issue a duplicate and triplicate of such commission or commissions, if necessary; and, if the Defendant joins in commission, it is ordered, that eight days' notice of the execution of the commission to the Defendant's commissioners, or one of them, be deemed good notice, and that the commissioners be authorized to swear one or more interpreter or interpreters, who shall, upon his or their oath, solemnly swear, well and truly to interpret the oath or oaths and interrogatories which shall be administered and exhibited to the witnesses to be examined, out of the English language, into the language spoken by the said witnesses, and also to interpret their depositions taken to the said interrogatories;

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gatories (*a*); and it is ordered, that the injunction granted in this case, for stay of the Defendant's proceedings at law, be extended to stay the trial of the action at law, until after the return of the said commission, or this Court shall make further order to the contrary; but, if any delay arises in obtaining the return of the said commission, the Defendant is to be at liberty to apply to this Court, respecting the same, as he shall be advised."

Reg. Lib. A. 1817, fol. 1949.

On this day the Defendant moved to discharge the Vice Chancellor's order.

Mr. *Agar* and Mr. *Boteler* for the motion.

It has been decided, we admit, in *Noble* v. *Garland* (*b*), that a commission to examine witnesses abroad may be obtained before answer, if the time for answering is expired; but the present order proceeds to extend the injunction to stay trial until the return of the commission; such an extension of the terms of the injunction is never made, except on an affidavit of belief that the answer will be material to the defence at law. At least the Court

(*a*) See *Smith* v. *Kirkpatrick*, 1 *Dick*. 105. *Lord Viscount Belmore* v. *Anderson*, 4 *Bro. C. C.* 90. 2 *Cox*. 288. The oath administered to the interpreter in that cause, required him to keep the depositions secret, until publication passed; see the order from Lord *Colchester's* Notes, 4 *Bro. C. C. ed. Belt*. 90. n.

Examination of Aliens.

"18 *Nov.* 1673. 25 *Car.* 2. I established a rule that no alien be examined as a witness without a motion first made in Court to swear an interpreter, that so the other side may know him, and take their exceptions to the interpreter; but for the present I allowed a witness at the hearing, because the exception came too late." Lord *Nottingham's* MSS.

(*b*) *Coop*. 222. 19 *Ves*. 372.

will

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will require the Plaintiff to give security. *Foderingham* v. *Wilson.* (a)

Mr. *Bell* against the motion.

The LORD CHANCELLOR.

As I understand, the question to be tried in the action at law is, whether the linseed sold by the Plaintiffs to the Defendant was or not seed of a particular year. That question, in all human probability, must be decided by the testimony of witnesses in the country where the seed was grown. The Defendant may have good ground for believing that it is not the seed of the year specified, but all proof must come from that country. Without entering into the question how courts of law deal with cases in which witnesses are abroad (b), it is a part of the ancient jurisdiction of this Court, where a bill is filed for discovery, to compel that discovery, and to aid the trial of an action, by issuing a commission for the examination of witnesses in foreign countries; and the issuing of that commission would be absurd, unless the party had the benefit of it to produce testimony at the trial.

I have a recollection of cases, in which it has been held, that the Defendant shall not have a commission, till he has answered, for *non constat*, that after his answer a commission will be necessary: his answer may enable the Plaintiff at law, also Plaintiff in equity, to succeed at law. The case is different when the Defendant puts in an answer which may be true, but the truth of which can be proved only by witnesses examined abroad. But it is the Defendant's fault that his answer is not filed in time. The rule of the Court is, that, if the time for answering

(a) *Coop.* 222. n. 19 *Ves.* 373. n.

(b) See *Mostyn* v. *Fabrigas*, *Cowp.* 174, 175. *Furly* v. *Newnham*, *Dougl.* 419. *Calliand* v. *Vaughan*, 1 *Bos. & Pull.* 210.

is

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is expired, the Plaintiff may have a commission before answer, otherwise the Defendant might deprive the Plaintiff of a commission, during all the period of orders for time.

In the case in which the Court, granting the commission, ordered the Plaintiff to give security, the parties had referred the matters in dispute to arbitration, but the arbitrator made his award two days after his authority expired. (*a*)

The authorities referred to seem to have settled the practice, and it must not be altered capriciously. The object of granting the commission is to collect evidence for the trial; the consequence of which is, that, *prima facie*, the trial must not take place till the return of the commission. (*b*)

Motion refused. (*c*)

(*a*) *Foderingham* v. *Wilson*, 19 *Ves.* 373. n.

(*b*) See *Nicol* v. *Verelst*, 4 *Bro. P. C. Ed. Toml.* 416.

(*c*) The following are the principal cases on commissions to examine witnesses in foreign countries. *Jessup* v. *Duport*, *Barnard.* 192. *Lowther* v. *Whorwood*, *Bunb.* 20. —— v. *Romney*, *Amb.* 62. *Coote* v. *Coote*, 1 *Bro. C. C.* 448. *Akers* v. *Chancy*, 2 *Bro. C. C.* 273. *Oldham* v. *Carleton*, 4 *Bro. C. C.* 88. *Bourdillon* v. *Alleyne*, 4 *Bro. C. C.* 100. *Cojamaul* v. *Verelst*, 4 *Bro. P. C. Ed. Toml.* 407. *Nicol* v. *Verelst*, 4 *Bro. P. C. Ed. Toml.* 416. *Cook* v. *Donovan*, 3 *Ves. & Bea.* 76. *Noble* v. *Garland*, *Coop.* 222. 19 *Ves.* 372. *Chemmant* v. *De la Cour*, 1 *Madd.* 208. *King* v. *Allen*, 4 *Madd.* 247. *Thorpe* v. *Macaulay*, 5 *Madd.* 218. *Atkins* v. *Palmer*, 4 *Barn. & Ald.* 377.

1818.

June 22.

SMITH *v.* GRAHAM.

The deposition of a witness examined previously to the decree, on his re-examination before the master without an order for that purpose, suppressed with costs, on motion of which notice was given four days after publication. The usual order was afterwards obtained for his re-examination, on interrogatories to be settled by the master, to matters to which he had not been before examined.

THE decree, in this cause, directed a reference to the Master to take certain accounts, and the Plaintiffs having carried in two states of facts charging the Defendants with the receipt of various sums of money, on the 2d of *May*, 1818, *J. W. Ready* was examined before one of the examiners, as a witness in support of the charges, without any order obtained for that purpose, although he had been examined as a witness in the cause previous to the hearing.

Mr. *Agar*, for the Defendants, moved, that the deposition on the second examination might be suppressed, referring to *Browning* v. *Barton* (*a*), and *Sawyer* v. *Bowyer*. (*b*)

Mr. *Winthrop*, against the motion.

1. The deposition is not irregular; the rule of the Court prohibits only examinations to the same matter to which the witness had been previously examined. It appears here, by affidavit, that the examination was to different matters. 2. It is too late to object to the examination, even if irregular, after publication. The Defendants had notice that this witness would be examined, and should have objected before they knew the effect of his evidence. The Court discourages objections to witnesses after publication. In *Callaghan* v. *Rochfort* (*c*), Lord *Hardwicke* said, that it was never allowed to exhibit articles against the competency of a witness (a practice equivalent to the modern proceeding by motion) after

(*a*) 2 *Dick*. 508.
(*b*) 2 *Dick*. 639. 1 *Bro. C. C.* 388.
(*c*) 3 *Atk*. 643.

after publication, unless the objection came to the knowledge of the party, after examination. 1818. SMITH v. GRAHAM.

The LORD CHANCELLOR.

The single difficulty in this case arises from the period at which the motion is made, namely, after publication. The fact, that the examination is not to the same matters, is not an answer to the application. The established practice is founded on this principle, that the Court expects to have the judgment of the Master, in the first instance, on the interrogatories, in order to prevent depositions that may affect the previous statement of the witness. Adopting a rule to avoid the necessity of itself inquiring, in every case, whether the examination is to the same matters, the Court, for that purpose, directs the Master to settle the interrogatories.

Mr. *Agar*. Publication passed on the 21st of *May*, and, on the 25th, notice of this motion was given.

The LORD CHANCELLOR.

Let the depositions be suppressed with costs, but without prejudice to any application for the re-examination of the witness.

Reg. Lib. B. 1817, fol. 1228.

On this day, Mr. *Winthrop* moved "that *W. J. Ready* be examined as a witness on behalf of the Plantiffs, under the said decree, to any matters to which he has not been before examined, and that it be referred to Mr. *Courtenay*, one, &c., to settle the interrogatories for that purpose; which, upon hearing Mr. *Agar*, of counsel for the Defendants, is ordered accordingly." *July* 2.

Reg. Lib. B. 1817, fol. 1112. (*a*)

(*a*) See *Browning* v. *Barton*, 2 *Dick*. 508. *Sawyer* v. *Bowyer*, 2 *Dick*.

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2 *Dick.* 639. 1 *Bro. C. C.* 588. *Sandford* v. *Paul*, 2 *Dick.* 750. 3 *Bro. C. C.* 370. 1 *Ves. Jun.* 398. *Cowslade* v. *Cornish*, 2 *Ves.* 270. *Vaughan* v. *Lloyd*, 1 *Cox*, 312. *Smith* v. *Althus*, 11 *Ves.* 564. *Greenaway* v. *Adams*, 13 *Ves.* 360. *Purcell* v. *M'Namara*, 17 *Ves.* 434. *Birch* v. *Walker*, 2 *Schoales & Lefr.* 518. The following case is extracted from a MS. in the possession of the Editor.

Hilary Term, 1715.

PEARSON *v.* ROWLAND.

Under a commission for the examination of witnesses, several witnesses on the part of the Defendant having appeared and been examined by the Plaintiff, the Defendant then declining to examine them, their depositions on a subsequent examination by the Defendant in the examiner's office without leave of the court, not suppressed.

The Plaintiff and Defendant filed several interrogatories in the office, and afterwards joined in a commission, where the Plaintiff exhibited the same interrogatories, and the Defendant part of his, but omitted, *inter alia*, the interrogatory exhibited to prove a will in question, not having the will at the commission. Several witnesses appeared, who were the Defendant's witnesses to the will, and the Plaintiff examined them to several matters; and the Defendant declined to examine them to any then, not having the will there, but afterwards examined them in the office without the leave of the Court.

Upon a motion to suppress these depositions in the office, the regularity of this cross-examination was referred to the two senior masters. Sir *Thomas Grey* reported it regular, Mr. *Rogers*, irregular. And, upon a second motion to suppress, after these reports, it was urged for the Plaintiff, that cross examination of a witness at the office, who had appeared and been examined at a commission where the other side joined, and had interrogatories, and an opportunity of cross examining there, was unprecedented, unless it were to prove an exhibit, and not even that without the leave of the court; that the allowing it would introduce perjury, it being known, that neither the commissioners nor the clerks are sworn to secrecy (*a*), and that it is no hard matter for a party to discover what a witness has sworn at a commission; and when he knows it, if he hath time between the witness's

(*a*) An order of *February* 1721. directs the commissioners and their clerks to take an oath of secrecy. Orders in Chancery, *Ed. Beames*, 327. 330.

examination

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examination and cross examination, he may tamper with him to retract or contradict his first examination upon his second; that, therefore, the examination ought to be perfected *uno flatu*, and by the same commissioners, who might refresh his memory if they found him inconsistent with himself; that if both sides joined in a commission, though the one exhibited no interrogatories, the Court, so far, regards the probability of that party being informed of the depositions by the commissioners, as not to allow them to examine after without the leave of the Court, and without referring it to a master to settle the interrogatories.

Vernon è contra. This is the first time that this was ever made a question; nobody ever thought but that both parties were at liberty to examine, or cross-examine, in the office at any time before publication; but if the doctrine prevails, it will put an end to all second examinations in the office, or at commissions; if the supposition of a party having a means of knowing what a witness has sworn at a commission be a reason to hinder his cross-examining him at a future day, it is equally good against any further examination of any other witnesses, lest they should be drawn to contradict the first. It is, indeed, a rule of the Court, that where a party has examined a witness to some interrogatories, he shall not examine him again to others, without the leave of the Court; and, for this reason, we declined examining these witnesses at the commission when we had not the will, and could not complete their examination; and it is true, that if a party's commissioners have been present at one commission without filing interrogatories, the Court, upon application for a second, will direct the pleadings to be laid before a master, for him to draw proper interrogatories; but here our interrogatories were all exhibited before the commission, and no room to suppose them adapted to overthrow what had been sworn. The reason given for the necessity for cross-examining by the same commissioners, will appear to have nothing in it, if it be considered that the commissioners ask their questions out of the interrogatories; and it is notorious, that in the examiner's office, if a witness be examined, the same examiner does not cross-examine him, but the examiner on the other side. Had we applied for a new commission, the

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the Court, perhaps, would have permitted us, for not being provided to examine our witnesses at the commission, by obliging us to bring them to the office; but that we have done voluntarily and regularly.

The LORD CHANCELLOR. — Where the reasons for suppressing depositions are doubtful, they ought to be preserved: When they are suppressed, the Court has no means to judge upon them; but when they are preserved, truth has that probability in it, and falsehood is generally attended with some mark or inconsistency, that there is no danger of the Court being misled by them; but, in this case, it might be very inconvenient to establish such a rule as the Plaintiff desires; one party might, by that means, trick the other out of his evidence, by asking his most material witnesses two or three immaterial questions, where he finds him not fully provided to examine them, and then telling him you must examine them now or never."

June 29.
July 1, 2.

VAWSER *v.* JEFFERY.

A covenant to surrender copyhold previously devised, is a revocation of the will in equity, if the surrender would have been a revocation at law.

GUYLOTT COWHERD, being seised of freehold and copyhold estates, on the 24th of *April*, 1794, surrendered the latter to the use of his will, which was dated on the same day, and contained various devises of his estates, copyhold and freehold. By indentures of lease and release, dated the 14th and 15th of *February*, 1800, *G. Cowherd*, on his marriage, conveyed certain of the freehold and copyhold estates, comprised in his will, to trustees, upon trusts specified, and covenanted to surrender the copyholds to the uses of the deed, but no surrender was made. *G. Cowherd* died, without issue, in *May* 1801.

On a bill filed by his co-heirs at law, and customary heirs,

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heirs, for an execution of the trusts of the settlement, the Master of the Rolls declared the deed a revocation of the devises of the freehold and of the copyhold estates. (*a*) The cause now came before the Lord Chancellor, on appeal from that decree.

Mr. *Wetherell* and Mr. *Wilbraham*, for the Defendants.

Upon the first question in this case, whether the devise of the freehold is revoked, we cannot question the authority of *Cave* v. *Holford* (*b*), but it is extraordinary that the distinction between the two deeds in that case, the latter of which was designed only to secure an annuity payable as a jointure, was scarcely noticed, except by the Chief Justice of the Common Pleas, who held the latter not a revocation. There seemed strong ground for contending that such deed is within the rule established from the earliest times, that a conveyance, executed for the partial purpose of securing a sum of money, is not a revocation of a previous will, disposing of the estate. The principle is, that an imperfect conveyance is not a revocation, unless inconsistent with the will; that is, unless the purpose to be accomplished is contrary to the will. *Montague* v. *Gefferies* (*c*), *Winkfield's* case (*d*), *Shove* v. *Pincke* (*e*), *Reid* v. *Shergold* (*f*). A conveyance for a partial purpose, is, in equity, a revocation only *pro tanto*, *Parsons* v. *Freeman* (*g*), *Sparrow* v. *Hardcastle* (*h*), *Harmood* v. *Oglander* (*i*), *Williams* v. *Owens*. (*k*)

(*a*) *Vawser* v. *Jeffery*, 16 *Ves.* 519., where the facts of the case are more fully stated.

(*b*) 2 *Ves. Jun.* 604. n. 1 *Bos. & Pull.* 576. 3 *Ves.* 650. 7 *T. R.* 399. 7 *Bro. P. C. Ed. Toml.* 593.

(*c*) 1 *Roll. Abr.* 615.

(*d*) *Godb.* 152.

(*e*) 5 *T. R.* 124. 310.

(*f*) 10 *Ves.* 370

(*g*) 3 *Atk.* 741. 1 *Wils.* 308. *Amb.* 116. 2 *Ves. Jun.* 431.

(*h*) 3 *Atk.* 798. *Amb.* 224. 7 *T. R.* 416. n. *Keny.* 67.

(*i*) 6 *Ves.* 199. 8 *Ves.* 106.

(*k*) 2 *Ves. Jun.* 595.

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In *Cave* v. *Holford*, the question, whether the deeds were a revocation of the will in equity was, in effect, decided at law; and, on the return of the case to this Court, the distinction of the latter deed, as executed for a partial purpose, was not adverted to.

The second question, whether the deed is a revocation of the devise of the copyhold, rests on different principles. With regard to the copyhold, the deed operates, not as a conveyance, but as a covenant, and the question is, whether, if a copyholder, having surrendered to the use of his will, and made a will, afterwards, on marriage, covenants to surrender the copyhold for the particular purpose of securing a jointure to his wife, that covenant revokes the will? On this question, no direct authority occurs, but, on principle, the decree is wrong.

The cases cited on the former argument, *Rider* v. *Wager* (a), and *Cotter* v. *Layer* (b), have no application to the present; in them, the subsequent deed, being a complete disposition of that which had been given by the will, inevitably worked a revocation, or, more accurately, an ademption of the subject on which the will was designed to operate; and the only doubt there, was, whether the covenant bound the realty, acted *in rem*, or gave no more than a right to damages. In *Knollys* v. *Alcock* (c), the co-parcener of the testatrix had become owner of the estate of which the will purported to dispose.

The proposition, that the covenant is a revocation of the will, must proceed on the assumption, that the covenant could not have been executed but by a conveyance, which would have operated a revoca-

(a) 2 *P. W.* 328., see p. 332.
(b) 2 *P. W.* 622.
(c) 5 *Ves.* 648. on appeal, 7 *Ves.* 558.

tion;

tion; if the act done were not a revocation at law, the agreement to do it could not be a revocation in equity.

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The doctrine of revocations of devises of freehold, on which the devise operates as a conveyance, proceeds on the nature of legal seisin, which changes with every change of the legal estate, and on the words of the statute of wills; and is not applicable to devises of copyhold, which operate as appointments. The Plaintiffs contend, that, if the covenant had been executed by surrender and admittance, the estate which the testator would have taken, subject to the term, would have been a new estate. That doctrine was certainly sanctioned by Lord *Coke* (*a*), but is now exploded; and the conclusion collected by the most respectable text-writers from the decisions, is, that the estates derived under the uses of a surrender, are new estates, so far only as they differ from the estate in the surrenderer, at the time of the surrender. (*b*) In *Thrustout* v. *Cunningham* (*c*), it is expressly decided, that a copyholder in fee, having surrendered to the use of his will, and subsequently surrendering to particular uses, with the reversion to himself in fee, may devise the reversion, without any new surrender to the use of his will; and the same doctrine is recognized in *Roe* v. *Griffits.* (*d*) It is clear, therefore, that if the testator had done all that the covenant required, his acts would not have revoked his will.

(*a*) *Allen* v. *Palmer*, 1 *Leon.* 101.

(*b*) *Fearne*, *Cont. Rem.* 67. *et seq.* 1 *Walk. on Copyhold*, 95. *et seq.*

(*c*) 2 *Bl.* 1046. *Fearne*, *Cont. Rem.* 68. Some observation was made on a supposed inconsistency between the two statements of this case, which not being verified on examination, has been omitted. The report of Sir *William Blackstone* seems to agree with that of Mr. *Fearne*, in describing the settlement of 1744, as made by *Thomas*, the father, on his own marriage, not on the marriage of his son.

(*d*) 4 *Burr.* 1952.

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If a copyholder, having made a will without surrender, afterwards surrenders to such uses as he shall by will appoint, and dies without a new will, the copyhold passes by the former. *Spring* v. *Biles.* (*a*)

Beyond the provision for the wife, the covenant is voluntary, and a court of equity would not decree an execution nugatory for every other purpose, merely to effect a revocation of the will.

The LORD CHANCELLOR.

On the first question in this case, with regard to the copyholds, the late Master of the Rolls thought it clear, that if there had been a surrender to the uses of the covenant, the will would have been revoked at law.

The other question, with which this Court alone can deal, is, whether, admitting that the surrender would have been a revocation at law, the covenant is a revocation in equity? It is contended, that, if the widow had applied to this Court to have the covenant executed, the Court need not have directed any such acts as would raise this question. My present opinon is, that I must consider the testator to have died with the intention which he expresses in the covenant, unless it can be shown that he intended otherwise to execute his purpose of providing a jointure.

It is further argued, that this is not a revocation in equity, because it is a conveyance for a partial purpose. Upon that, I am of opinion, that if the surrender is a revocation at law, the covenant will be a revocation in equity. As to mortgages, conveyances for payment of debts, and other conveyances to secure merely personal interests, it is perhaps stated too generally, that they are

Effect of conveyances for securing personal interests,

(*a*) 1 *T. R.* 435. n.

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on a previous devise of the estate conveyed.

not revocations beyond the purpose. What Lord *Hardwicke* rests the doctrine on is this, that a court of equity looks on a conveyance for securing a sum of money, whatever is the form of the conveyance, as a security only (*a*); but, if a man conveys the *whole* of his estate, taking back an estate for life, or giving an estate for life to another, that is a revocation. I have no conception that this doctrine of equity, in cases of conveyance for payment of money, has ever been applied, except where the conveyance is considered only as a security for payment of money. Though a conveyance for a particular purpose will necessarily operate as a revocation no further than the particular purpose requires, yet, if the conveyance goes beyond what the particular purpose requires, that will be a revocation.

That brings back the material question, whether the covenant, if executed, would be a revocation; on which I believe, there is no decision. Perhaps the best course will be to direct a case. If the surrender would be a revocation at law, I think the covenant will be a revocation in equity; but whether the surrender would be a revocation, is a question undecided.

It is now settled, at least I shall so consider it till the House of Lords decides the contrary, that if a man devises a fee-simple estate, and afterwards for securing a jointure, instead of simply limiting a jointure, which would be quite enough, by lease and release, conveys the estate out of which jointure is to come, to the use of himself for life, with remainder, to the intent and purpose, that the intended wife may take a rent charge, and to the use that she may distrain, (for that may be limited

(*a*) The *dictum* referred to, from Lord *Hardwicke*'s judgment in *Sparrow* v. *Hardcastle*, *ubi supra*, is more distinctly reported by Lord *Kenyon*, 70.

by

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A right of distress may be limited by way of use.

A conveyance of the whole estate, though for a partial purpose, is a revocation.

by way of use (*a*),) and then to enter, with remainder to trustees, for ninety-nine years, the better to secure the jointure, with the ultimate remainder to himself and his heirs; although the moment he takes* the seal off the wax his old estate is *eo instanti* vested in himself, that is a revocation of the will; the true question, with reference to copyhold estates, being, whether there is about as much charge of estate, in the transaction with the Lord, as in that conveyance. Lord Chief Justice *Eyre*'s argument, in *Cave* v. *Holford* (*b*), is, no doubt, extremely able; but it is settled, that, if a man devises his freehold estate, and afterwards makes a settlement with a limitation to his own right heirs, that indeed is his old use, yet, because he takes it back by a conveyance which purports to pass his whole estate, it is a revocation.

The effect of the surrender is a pure legal question; and if it can be distinguished from *Cave* v. *Holford*, it is material that it should be so distinguished by courts of law; and to them the question must be addressed, quite clear of all consideration of equitable revocation, on the statement of a surrender made.

Imperfect conveyances may amount to a revocation, as evidence of intention.

If this proceeds to a case, my notion would be to suggest the consideration of a point that has not yet been argued, whether, if the testator had attempted to convey his copyhold estate in the same manner as he has conveyed his freehold estate, that would not afford evidence of his intention, however incomplete the conveyance may be? A bargain and sale without enrolment, feoffment without livery of seisin, imperfect conveyances, though not capable to pass the estate, would amount to a revocation.

Copyhold estates not being within the statute which

(*a*) See *Cassamajor* v. *Strode*, *post* p.

(*b*) 3 *Ves.* 662. *et seq.*

requires

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requires the attestation of three witnesses to a will (a), it may be a question, whether many acts are not revocations of a will of copyholds, which would not work a revocation in the case of freeholds; and it will be material for both sides to look into cases of revocation of wills prior to the statute of frauds.

On the request of Mr. *Hart* and Mr. *Roupel*, for the Plaintiffs, a case was ordered. *July 2.*

July 2. 1818.—"His Lordship doth order, that a case be made for the opinion of the judges of his Majesty's Court of King's Bench; and it is ordered that the question be, whether the devise of the copyhold estates in the will of *G. Cowherd*, the testator in the pleadings named, was revoked by the surrender of the said copyhold estates, to the uses of the indenture of settlement bearing date the 15th day of *February* 1800, pursuant to the covenant therein contained; and it is ordered, that such case do state the said indenture of settlement, and that an actual surrender had been made, pursuant to the covenant by the said *G. Cowherd*, of the said copyhold estates to the uses of the said indenture of settlement, and all other necessary facts; and it is ordered, that it be referred to Mr. *Courtenay*, the Master to whom this cause stands transferred, to settle such case, in case the parties differ about the same; and the judges of the Court of King's Bench are to be attended with such cases; and it is ordered, that the appeal do

(a) 29 *Car.* 2. *c.* 3. *s.* 5, 6.

stand

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stand over until after the judges of the Court of King's Bench shall have made their certificate."

Reg. Lib. B. 1817, fol. 1649. (a)

(a) The judges of the Court of King's Bench certified, that "the surrender made by *G. Cowherd*, of the copyholds, to the uses of his marriage-settlement, did not revoke the surrender made to the use of his will, and the devise of such copyholds." *Vawser* v. *Jeffery*, 3 *Barn* and *Ald.* 462.

Revocation of a will in equity.

The following case on revocation is extracted from Lord *Nottingham*'s MSS. "*Elton* v. *Harrison*, *March* 5. 26 *Car.* 2. 167¾. The Lady *Anderson*, *cestui que trust*, devised to Mr. *Harrison*, and then directed her trustees to make new conveyances to other trustees for her and her heirs, and died without any new publication; I held this to be a revocation; for devises of equity are as revocable as devises of land; and *ergo*, when the testator does any act, either inconsistent, or in any way working upon the thing devised, his intent is presumed to be changed without a new publication; as a feoffment to the use of the testator and his heirs revokes the will, though it be the old trust; but a case was desired, which I granted.

Elton v. *Harrison*, *June* 6. 28 *Car.* 2. 1676. The Lady *Anderson*, *cestui que trust* of lands and rents in *Norton*, devises several legacies, all which before-mentioned legacies not limited to a continued payment, my will is, shall be paid within a year, if my lands in *Norton* can be sold, and gives the residue, after debts and legacies paid to the Defendant, whom she makes her executor; and afterwards, by deed, under hand and seal, appoints her trustees to transfer the trust, to convey the lands in *Norton* to *Hall* and *Boys*, in trust for herself. *First*, I held this devise sufficient to give the executors authority to sell (a); *second*, But yet the subsequent conveyance by direction of the testatrix, was a revocation, without a new publication. Mr. *Attorney* urged the contrary, because the new conveyance had not put the testatrix's interest in another plight, for she had still a trust, and the same old trust, in her; and compared it to the case where a testator makes a feoffment to the use of himself and his heirs, which is the old use: and this, he said, was no revocation: I denied that case, and said it was expressly contrary to the printed

Executors empowered to sell.

(a) See *Bentham* v. *Wiltshire*, 4 *Madd.* 44.

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ed book, 1 *Car. Cro.* 24, and to the judgment there cited by *Yelverton* (a); *third*, Admit no revocation, yet the executor could not sell the land so long as the personal estate was sufficient; for though the land, if saleable, be assets in equity, yet certain it is, the personal estate was liable, in the first place, and it would be very hard, by a strained construction, to exclude the personal estate being contributory in the first place, on purpose to mend the executor's interest in the residuum of that personal estate. Wherefore the Defendant consented to pay the principal, and convey the land, so as interest and costs might be spared, which was accepted."

(a) 1 *Ro. Abr.* 616. *U.* pl. 4., cited by *Yelverton, J. Cro. Car.* 24.

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July 8. 10

A joint stock company established by act of parliament, vesting in them all property then belonging to them, and authorising them to bring actions in the name of their treasurer for the time being, having purchased an estate pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of part; on a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease.

IN *May*, 1804, *Moses Agar* agreed to let to *Richard Frost* a house in *Rotherhithe*, for twenty-one years from *Christmas* 1803, at an annual rent of 55*l.*, *Frost* paying 150*l.* towards the expenses of building the house. *Frost* accordingly paid that sum, and had possession of the house; but no lease having been executed, he, in *June* 1806, filed a bill for specific performance. *Agar*, by his answer, admitted the agreement, but alleged that he was unable to fulfil it, stating, that he had since sold and conveyed an estate at *Rotherhithe*, including the house in question, to *David Matthews*, who, before the

contract

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contract of sale was completed, was informed of the agreement with *Frost*, and engaged to perform it. *Matthews*, having been made a Defendant, by his answer, admitted, that, in the course of the treaty with *Agar* for the purchase of the estate, he understood that *Frost* occupied the house, under some lease, or agreement for a lease.

In *October* 1807, *Matthews* sold and conveyed the estates which he had purchased from *Agar* to Sir *Charles Price* and *William Browning*, in trust, for the *East Country Dock Company*.

By an act of Parliament, 51 *Geo.* 3. c. clxxi., entitled "An act for completing and maintaining the *East Country Dock* at *Rotherhithe*, in the county of *Surrey*;" it was enacted, that the several persons therein named, together with such other person or persons, body or bodies politic, corporate or collegiate, as should, according to the conditions and restrictions in that act contained, be possessed of any part of the joint stock of the said company, their several and respective executors, administrators, and assigns, being a proprietor or proprietors of any share or shares in the said dock or docks, should, for the purposes of the act, be a joint-stock company, by the name and style of the *East Country Dock Company*. The fourth section enacted, that all the messuages, lands, tenements, and hereditaments, which then belonged, or might thereafter belong, to the company, and all buildings, erections, and other matters and things thereon and thereunto belonging, and also all basins or docks, &c. which should be made, &c. by the company, should be, and the same were thereby, vested in the company; and it should be lawful for the company, in the name of their treasurer for the time being, to bring any action or actions, and to prefer or prosecute

any bill or bills of indictment, against any person who should damage, or cause to be damaged, any of the works to be made, erected, &c. by virtue of the act, or who should injure or destroy the same whilst doing, or impede the doing thereof, or steal, or wrongfully take away any materials or machines provided or to be provided from time to time, or used, or intended to be used thereon, or for any other purposes of the act, or who should wilfully do or suffer, or consent to do, any thing whereby damage might accrue to the messuage, erections, and buildings to be purchased, or the works or machines to be made or erected by virtue of the act.

In *May*, 1813, *Frost* having become bankrupt, and *Browning* being dead, the assignees of *Frost* filed a supplemental bill against Sir *Charles Price* and *Matthews*, which, on the hearing, was dismissed as against Sir *Charles Price*, without costs, with liberty for the Plaintiffs to amend by adding parties. (*a*)

The supplemental bill was afterwards amended by making *Thomas Maltby*, the treasurer of the *East Country Dock*, and seven other persons, the directors, Defendants, alleging that the treasurer and directors were also the holders, or possessed of, and entitled to, certain shares of the joint stock of the company, and a considerable number of other persons were likewise the holders of, or entitled to, shares of the joint stock; but the shares of such stock or concern being transferrable at the pleasure of the respective

(*a*) " 19 *June*, 1815. His Honor doth order, that this cause do stand over, with liberty for the Plaintiffs to amend their bill, by adding proper parties thereto, with apt words to charge them; and it is ordered that the plaintiff's bill do stand dismissed out of this court without costs, as against the defendant Sir *Charles Price*, Baronet."—Reg. Lib. B. 1817, fol. 1616.

holders

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holders thereof, the Plaintiffs were unable to discover or ascertain who were the present holders or proprietors of shares, or where they respectively resided, or were to be met with, or who, by name, at present constituted the *East Country Dock Company.* The bill prayed, that a proper lease might be executed to the Plaintiffs, according to their agreement, and that they might be quieted in the possession of the premises, during the residue of the term of twenty-one years, and that the *East Country Dock Company* and the Defendants *Maltby*, and the present directors, and all future treasurers and directors of the company, might be restrained, by injunction, from obtaining possession of the house from the Plaintiffs; and that, if the Plaintiffs were not entitled to such lease as against the *Dock Company*, that the Defendant *Matthews* might be decreed to pay to the Plaintiffs such sum as would be the full value of the lease, if the same were granted, and that the value might be ascertained in such manner as the Court should direct.

The Defendants, by their answer, admitted, that the contract between *Matthews* and the company, and the conveyance to *Price* and *Browning*, were entered into and executed after *Matthews* had answered the original bill of *Frost;* and denying notice of the agreement with *Frost*, insisted that they were not bound to grant a lease.

Mr. *Hart* and Mr. *Shadwell*, for the Plaintiffs.

The Plaintiff's equity is clear, and relief may be obtained against the present Defendants, without bringing before the Court all the proprietors of the company. *Adair* v. *The New River Company.* (*a*) In a recent case of the *Gravesend* Watermen, before Sir *William Grant*, some individuals of each class were permitted to sustain the suit.

(*a*) 11 *Ves.* 429.

Mr.

Mr. *Agar* and Mr. *Wingfield* for the Defendants. 1818.

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The cases cited are not authorities for the present attempt. In no instance has the Court decreed a conveyance by some only of numerous parties interested in an estate, or directed them to procure the concurrence of the rest. The Defendants cannot grant the lease required; they have not the whole interest; they are ready to convey what they have. Can the master settle proper covenants in the absence of the other parties? An injunction, being ancillary to relief by the execution of a lease, to which the Plaintiffs are not entitled in this suit, cannot be sustained.

The MASTER *of the* ROLLS. *July* 10.

If this were a case between party and party, there could be no defence. The bill, for specific performance of the contract to grant a lease, was notice to the purchaser *pendente lite*, and it has been repeatedly decided, that the purchaser of an estate, in the possession of a tenant, is bound to inquire by what right, and under what agreement, the tenant holds it. (a) It is clear, therefore, that the present Defendants are as much bound by the contract, as the person who originally entered into it. They insist, however, that they have a right to proceed by ejectment to recover possession from the Plaintiffs. The single question is, whether there is a defect of parties to the suit.

Purchase of an estate in the possession of a tenant.

The general rule, which requires the Plaintiff to bring before the Court all the parties interested in the subject in question, admits of exceptions. The liberality of this

(a) *Daniels* v. *Davison*, 16 *Ves.* 249. 17 *Ves.* 433. *Allen* v. *Anthony*, 1 *Mer.* 282.

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Court has long held, that there is of necessity an exception to the general rule, when a failure of justice would ensue from its enforcement. I will shortly refer to some authorities, which show, from how early a date was established this doctrine of dispensing with parties, and admitting some to represent the absentees, where it would lead to great inconvenience to bring them all before the Court; authorities after which the subject is no longer open to argument.

The first case, the *City of London* v. *Richmond* (a), occurred in 1701, and the decree of this Court was affirmed by the House of Lords. (b) In the following year the same principle was adopted in *Quintin* v. *Yard.* (c) In *Vernon* v. *Blackerby* (d), Lord *Hardwicke* refers to the case of the Bubble, in 1720, in which, "although several persons were interested, yet they lodged a general power and authority in some few only, and therefore to avoid inconvenience from making such numerous parties, this Court restrained them to those particular persons who were intrusted with this general power." (e) In 1722, occurred *Chancey* v. *May.* (f) That indeed was the case of Plaintiffs suing in behalf of themselves and all other proprietors except the Defendants; but it appeared that the eighteen original shares of the undertaking had been divided into eight hundred; and the second reason assigned by the Court for over-ruling the demurrer, is, "that it would be impracticable to make all the proprietors parties by name, and there would be continual abatements by death, and otherwise, and no coming at justice, if all were to be made parties." (g)

(a) 2 *Vern.* 421.
(b) 1 *Bro. P. C. Ed. Toml.* 516.
(c) 1 *Eq. Ca. Ab.* 74.
(d) 2 *Atk.* 144.
(e) 2 *Atk.* 145.
(f) *Prec.* in *Cha. Ed. Finch.* 592.
(g) *Ibid.*

Cullen

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Cullen v. the *Duke* of *Queensberry* (*a*), determined in 1781, and *Horsley* v. *Bell*, in 1778, referred to in a note on that case (*b*), proceed on the same principle. In *Lloyd* v. *Loaring* (*c*), the reason given for sustaining the amended bill, is the absolute failure of justice, which would be the consequence of an opposite doctrine; and reference is made to *Fells* v. *Read* (*d*), and *Pearson* v. *Belchier*. (*e*) Lord *Eldon* concludes his judgment thus, "In the manuscript notes I have seen strong passages, as falling from Lord *Hardwicke*, that, where a great many individuals are jointly interested, there are more cases than those, which are familiar, of creditors and legatees, where the Court will let a few represent the whole, (considering the Court possessed of jurisdiction, on the principle that otherwise there would be a failure of justice). There is one case very familiar, in which the Court has allowed a very few to represent the whole world." (*f*) In *Adair* v. the *New River Company* (*g*), Lord *Eldon*, though he dismissed the bill, again recognized this principle. "It is insisted, that the Plaintiff cannot sue in equity, without bringing before the Court all the proprietors of the King's share, as well as the company, whose share is also subdivided; but those parties are represented; and, it is clear, no objection of that kind arises as to them," &c. (*h*) The Lord Chancellor there mentioned the case, which is to be added to those that I have stated, of a lord of a manor filing a bill to compel service to his mill. There "it is not necessary to bring all the individuals: why? Not that it is inexpedient, but, that it is impracticable, to bring them all. The Court therefore has required so many, that it can be justly said, they will fairly

(*a*) 1 *Bro. C. C.* 101., affirmed in the House of Lords, 1 *Bro. P. C. Ed. Toml.* 396.

(*b*) Reported also *Amb.* 770.

(*c*) 6 *Ves.* 773.

(*d*) 3 *Ves.* 70.

(*e*) 4 *Ves.* 627.

(*f*) 6 *Ves.* 779.

(*g*) 11 *Ves.* 429.

(*h*) *Ib.* 443.

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and honestly try the legal right between themselves, all other persons interested, and the Plaintiff." (*a*) In reference to the case before him, the Lord Chancellor concludes, that "it is competent to the Court to say, that if the Plaintiff brings so many of those, who represent the King's share, as can be taken duly and honestly to enter into that contest, in which all the others are concerned, that ought, in equity, to bind those who are present, representing those who are absent." (*b*)

In cases familiar to every practitioner in another Court, it is the course of every day to hold all parishioners bound by a suit to set aside or establish a *modus*, though some only are parties. The same principles have been recognized, in *Cousins* v. *Smith* (*c*), and, as I am informed, in a very recent case relating to the town of *Brighton*, the *Attorney-General* v. *Brown*. (*d*)

Here is a current of authority, adopting more or less a general principle of exception, by which the rule, that all persons interested must be parties, yields when justice requires it, in the instance either of Plaintiffs or Defendants. The rigid enforcement of the rule would lead to perpetual abatements. This, therefore, cannot be regarded as a new point, or as creating a difficulty. It is quite clear that the present suit has sufficient parties, and that the Defendants may be considered as representing the company. Can I then dismiss the bill for want of parties, because all the proprietors, admitted to be so numerous that it is difficult to find them, are not before the Court? There is no fair distinction in that respect between this case and those which have been stated.

The only novelty is, that the bill requires an act to be

(*a*) 11 *Ves.* 445.
(*b*) *Ibid.*
(*c*) 13 *Ves.* 542.
(*d*) *Ante*, vol. i. 265., see p. 306.

be done by the absentees. Not having them before the Court, though their rights may be bound, there is a difficulty in making them act. The Plaintiff requires specific performance of the agreement; and it would hardly be sufficient, supposing it proper, for a few to execute a lease on behalf of the rest. In a conveyance of the interest, all must join. But that difficulty presents no objection to binding the rights of the parties not before the Court. That is authorized by every one of the cases referred to. If the Court cannot proceed to compel the Defendants to do the act required, it must go as far as it can.

Consider what a failure of justice would otherwise ensue. In 1805, the owner of this land entered into an agreement to grant a lease for 21 years, for a rent and a pecuniary price. The land eventually comes into the possession of the Dock Company, who, representing the original party to the contract, are called on to perform it. On the merits, they have no defence; the Plaintiffs have as clear a right to this lease as the Defendants have to their estate. Are they to be left to an action at law, with all the difficulties relating to parties, and of ascertaining what damages or compensation they are to recover? To be expelled from this Court, where their proper remedy is, because the estate is in the hands of persons who will not perform the contract which they are bound to perform? Is that justice? Can this be assimilated to the cases in which courts of equity refuse relief, and leave the parties to an action? That is the practice only where an action will better accomplish justice, or where the Court is of opinion that the Plaintiff is not intitled. Here the impediment arises solely from the conduct of the Defendants, not from the difficulty of the case. The estate, without the Plaintiff's fault has come into the hands of persons who refuse to execute the contract. What would

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be the consequence of allowing the objection? Are the company aware, or do they mean to avow, that, in every case, it is impracticable to compel them to perform a contract? That, unless all the proprietors are made parties, which is impossible, no suit can be maintained against them, in equity? It is a benefit to the company to overrule such an objection. If it prevails, no one will ever contract with them. I cannot suppose that they intend, or will be advised, to insist on it.

Instead of dismissing the bill, I will do what I can to assist the Plaintiffs; bind the right, declare the Plaintiffs entitled to a lease, and restrain the treasurer from disturbing their possession. I have had doubt whether I ought not to go farther. It is hard that the Plaintiffs have not all the justice which they would have, as between party and party; that they cannot carry their lease to market: but thus far I shall certainly give relief.

"His Honor doth declare, that under, or by virtue of, the agreement in the pleadings mentioned, dated the 16th day of *May* 1804, the Plaintiffs are entitled to a case from the *East Country Dock Company* of the premises in question, for the unexpired term of twenty-one years from *Christmas* 1803, at the rent of 55*l.*; and it is ordered, that it be referred to Sir *J. Simeon*, Bart. one &c. to tax the Plaintiff's costs of the original suit, and of the supplemental suit against the Defendants, the treasurer and directors of the said company, and the Defendant, *David Matthews*; and it is ordered, that the Defendants in the supplemental suit do pay to the Plaintiffs such costs; and it is ordered, that the Plaintiffs do pay the rent to grow due from time to time, to the Defendant, *Thomas Maltby*, as treasurer, and to the treasurer for the time being, of the said company; and it is ordered, that such treasurer be restrained from bringing any action

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tion to disturb the Plaintiffs in the possession and enjoyment of the premises, during the term for which the Plaintiffs are hereinbefore declared to be entitled to a lease, and any of the parties are to be at liberty to apply to this Court as there shall be occasion." (*a*)

(*a*) See, in addition to the cases cited, *Brown* v. *Howard*, 1 *Eq. Ca. Ab.* 163. *Cuthbert* v. *Westwood*, *Gilb. Rep. in Eq.* 230. *Biscoe* v. *The Undertakers of the Land Bank*, 2 *Eq. Ca. Ab.* 166. pl. 7. *cit. Gilb. Rep. in Eq.* 230. *Moffat* v. *Farquharson*, 2 *Bro. C. C.* 338. *Good* v. *Blewitt*, 13 *Ves.* 397. *Brown* v. *Harris*, 13 *Ves.* 552. *Cockburn* v. *Thompson*, 16 *Ves.* 321. *Pearce* v. *Piper*, 17 *Ves.* 1 *Beaumont* v. *Meredith*, 3 *Ves. & Beam.* 180.

EDWARDS *v.* M'LEAY.

July 6. 10, 11.

An estate having been sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract, and unknown to the purchaser, the contract was rescinded, and the vendors were ordered to repay the purchase money, with all costs and expenses incident to the purchase and conveyance.

THE original decree in this cause (*a*), dated 19th *July* 1815, was as follows: "His Honor doth declare, that the sale in the pleadings mentioned, and the conveyance executed in pursuance of such sale, bearing date the 24th and 25th days of *May* 1811, were fraudulent and void; and doth order and decree, that the same be set aside, and the said conveyance delivered up to be cancelled; and it is ordered, that it be referred to Mr. *Steel*, one, &c. to inquire and state to the Court, when the Plaintiff quitted the beneficial possession of the house and premises in question in this cause, and to take an account of all sums of money paid, laid out, or expended, in repairs or improvements made by the said Plaintiff on the same, and the said Master is also to take an account of the costs, charges, and expenses, which the Plaintiff has incurred and been put to, in consequence of, or which have been incidental to, his purchase and conveyance thereof; and the Master

(*a*) Reported *Coop.* 308.

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is to compute interest at the rate of 5*l. per cent. per annum*, upon the several sums which, under the directions herein contained before given, he shall find to have been so paid, laid out, or incurred, and also upon the sum of 5390*l.*, from such time as the said Master shall find that the Plaintiff quitted the beneficial possession of the said house and premises; and it is ordered, that the Defendants do pay unto the Plaintiffs the said sum of 5390*l.*, together with what the said Master shall certify to be the amount of the several accounts hereinbefore directed, together with his costs of this suit to be taxed, &c.; and thereupon it is ordered, that the Plaintiff do re-convey and re-assign the said purchased premises, at the Defendants' expense, unto them the said Defendants, or as they shall direct, such conveyance and re-assignment to be settled by the said Master," &c.

Reg. Lib. A. 1817. fol. 1601 — 1605.

From this decree the Defendants appealed.

The case having been argued by Mr. *Hart* and Mr. *Shadwell*, for the Defendants, and Sir *Samuel Romilly* and Mr. *Spranger*, for the Plaintiff, the Lord Chancellor observed, that nothing appearing on the abstract which altered the nature of the case, he approved the judgment of the Master of the Rolls; and that the pleadings did not authorize the argument that a good title could still be made.

July 11.

The LORD CHANCELLOR.

Having read the pleadings, I am entirely of opinion, that, though it may be necessary to state with more precision the subject of inquiry relative to repairs and improvements, the decree is substantially right. Nothing

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was done by the Plaintiff after he knew the defect of the title; he certainly could have claimed no allowance even for subsequent repairs. The case resolves itself into this question, whether the representation made to the Plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision, but I agree with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract. In principle, therefore, the decree is right, though it seems to have gone too far on the subject of repairs and improvements. Its terms must be made conformable to the prayer of the bill; striking out the word "improvements," and leaving the word "repairs," I give the Plaintiff all that he has asked by his bill, and I cannot give him less.

July 11, 1818. "His Lordship doth order, that the decree made on the hearing of this cause, on the 19th day of *July* 1815, be varied, so far as it directs an account to be taken of all sums of money paid, laid out, or expended, in improvements made by the Plaintiff, on the house and premises therein mentioned; and, instead thereof, it is ordered that it be referred to the said Master, to take an account of all costs, charges, and expenses, which the Plaintiff has been properly put to, in consequence of, or which have been incident to, the purchase of the said house and premises, and the conveyance thereof to the Plaintiff; and, for the better taking of such account, the parties are to produce, &c.; and, with the said variation, it is ordered, that the said decree be affirmed; and, it is ordered, that one moiety of the sum of 10*l*., deposited with the register, &c., be paid to the plaintiff," &c.

Reg. Lib. A. 1817, fol. 1813.

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Ex parte BROWN.

July 9.

Commission superseded, on the petition of the bankrupt under commitment for not answering, with the consent of all the creditors.

THE bankrupt being under commitment for not answering to the satisfaction of the commissioners, petitioned that the commission might be superseded; all the creditors who had proved debts had signed their consent to the petition, and the commissioners certified to that effect. Mr. *Montagu*, for the petition, cited *Ex parte M'Gennis* (*a*), overruling *Ex parte Bean.* (*b*)

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If a bankrupt, under commitment, applies to supersede a commission, by reason of its invalidity, he is entitled to be heard, as in *Ex parte M'Gennis*; but that he shall be discharged, on consent of the creditors, when committed under a valid commission, is a different proposition. At least, the order must be qualified by an undertaking on his part, to bring no action, in respect of his commitment, and to confirm sales under the commission. With those qualifications, unless I intimate an opinion to the contrary to-morrow, you may take the order.

July 10.

The LORD CHANCELLOR.

With the consent of all the creditors, it is of course to supersede the commission; the consequence is, that the authority for keeping the bankrupt in custody has ceased. He must be discharged upon the terms which I intimated.

(*a*) 18 *Ves.* 289. 1 *Rose*, 60. (*b*) 17 *Ves.* 47. 84.

" Now

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"Now upon hearing the said petition read, and what was alleged by the counsel for the petitioner, and the petitioner undertaking not to bring any action, and also to confirm all sales made by the said assignees under the said commission, I do order, that the said commission issued against the petitioner *J. Brown*, and dated the 11th of *March* 1817, be superseded, and that a writ of *supersedeas* do forthwith issue for that purpose." Orders in Bankruptcy, 1818., Lib. 149., p. 30.

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July 14. 16.

A decree pronounced in 1670, in a suit against the trustees of a charity, impropriate rectors, and persons interested in the due application of the funds, to which the Attorney-General was not a party, having directed the trustees under the indemnity of the Court, to perform an agreement with the Plaintiff in that suit, for granting a lease of tithes for 980 years at a fixed pecuniary rent, and an exchange of lands, and the conveyances having been accordingly executed, and the rent constantly paid, and the lands enjoyed in conformity to the decree; an information by the Attorney-General, at the relation of the present trustees, against the person claiming under the Plaintiff in the former suit, for an account of tithes, not stating the decree of 1670, which was set forth in the answer, was dismissed.

THE information filed, on the 21st *November*, 1815, at the relation of the trustees of "*Foljambe's* Charity," stated, that *Godfrey Foljambe*, by his will, dated the 24th of *February*, in the 37th year of the reign of *Elizabeth*, devised to *Isabel Foljambe*, his wife, and her heirs, the rectory and parsonage of *Adenborough*, in the county of *Nottingham*, together with the glebe lands, upon trust, (after the expiration of a term of years which *George Foljambe* had therein), to pay certain annuities to the preacher and schoolmaster at *Chesterfield*, and to the Masters and Fellows of *Jesus* and *Magdalen* Colleges, *Cambridge*, and to apply the residue of the rents and profits towards the relief of the poor of the parish of *Chesterfield*, at the view and oversight of his executors and the survivor; and after their decease, of such per-

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son as should be owner of his mansion-house of *Walton*; that, by a conveyance dated the 27th of *August*, 1584, *Isabel Foljambe* granted the rectory to *William Ireton*, and *Mary*, his wife, and their heirs, to pay the sums of money, and accomplish the purposes expressed in the will.

The information further stated, that the succession of trustees had been regularly continued, and that the rectory was then vested in the relators on the trusts of the will, and they, as impropriate rectors, were entitled to the tithes of corn, grain, and hay in the parish of *Adenborough*; and that the Defendant, Sir *John Borlase Warren*, Baronet, then was, and, since 1809, had been, the owner of lands within the parish.

The information, stating, by way of pretence, a lease, dated the 12th of *September*, 1763, by which the trustees of that time granted to *Arthur Warren*, an ancestor of the Defendant, the tithes of the lands then belonging to him within the parish, for 980 years, charged, that the compensation made by the pretended lease to the trustees for the tithes, was grossly inadequate and fraudulent, and that the lease was illegal and wholly void, and that the then trustees were not enabled to enter into, or to grant any such lease, tending, in the highest degree, to injure the interest of the charity; and the relators submitted, that the lease was fraudulent and void, and could only be binding on the parties thereto.

The information prayed, that the pretended lease, or agreement for a lease, might be declared to be illegal and void, and ordered to be delivered up and cancelled, and that an account might be taken of the single value of all the titheable matters which had arisen on, or from, the farms and lands occupied by the Defendant, and that he

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might pay to the relators what should appear to be due from him, the Plaintiff waiving all pains and penalties that might have been incurred by the Defendant, for subtracting or not setting out the tithes.

The answer of the Defendant stated, that the rectory being in the possession of *Henry Foljambe*, under a lease from the trustees, and *Arthur Warren* being possessed of the manor of *Toton* (a part of the parish of *Adenborough*,) and of some arable lands in the parish, for the remainder of a term of a thousand years, (the reversion in fee being vested in *Benjamin Weston* and *Hopton Shuter*, in trust for him,) and having entered into the agreement after-mentioned, in *Easter Term* 1662, *Arthur Warren*, in conjunction with his trustees *Weston* and *Shuter*, exhibited a bill in Chancery against *Henry Pierpoint* and the other trustees of the charity, *Henry Foljambe*, the tenant of the rectory, the masters and fellows of *Jesus* and *Magdalen* Colleges, *W. B.* the preacher and *R. S.* the schoolmaster of the parish of *Chesterfield*, and the churchwardens and overseers of the poor of the parish, stating the foundation of the charity, and that there being tithes payable by *Arthur Warren*, out of his manor and lands, to the impropriators of *Adenborough*; about *September* 1661, he treated with *Henry Foljambe* for the payment of a certain sum of money in lieu of such tithes, and for laying the lands belonging to the rectory, which were intermixed with *Arthur Warren*'s lands, into several closes by themselves; and that it was agreed between *Warren* and *Henry Foljambe*, that the former should pay to *Foljambe*, during his term in the rectory, 60*l.* *per annum* for the tithes, and that the taxes should be equally borne between them, and that the glebe lands, which were arable lands lying in the fields of *Toton*, should be all laid together in one place of the fields, at the choice of *Foljambe*, and that *Warren* was to fence

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fence them out, and the Defendants to maintain the fence afterwards, and that such lands were to continue tithe-free for ever to the rectory; that the meadow and pasture-grounds belonging to the glebe in *Toton* should be set forth and laid together, as *Warren* and *Foljambe* should agree, to remain in severalty for ever tithe-free; and that *Foljambe* should have seven acres of land set out in *Toton Moor*, towards *Chelwell*, to be and remain to the rectory for ever, in satisfaction of all common of pasture belonging to the rectory lying within *Toton*, and that *Foljambe* should maintain the fence towards *Chelwell*, and the same towards the lane then made by *Warren*; and that *Warren* was also to divide that part of the *Holme Leyes* belonging to the rectory, which was staked out from the rest, and to maintain all the fences of the same for ever; and pay 40*s.* to *Foljambe*, and give him twenty loads of stone towards making a bridge; and that he was also to divide the meadows belonging and laid out to the rectory from the vicar's lands, and *Foljambe* was to have as much laid out for it, with a convenient way through certain adjoining lands; that the bill farther stated, that this agreement had been reduced into writing, and was to be confirmed by *Pierpoint* and the rest of the trustees, and that they being acquainted with it, and being sensible of the advantage that would arise to the charitable uses, approved of the agreement; and that *Warren* had laid out the arable lands, and in other particulars performed his part of it, and offered to secure the payment of the 60*l. per annum*, by a conveyance of a part of the manor of *Toton*, then on lease, and by bond during the continuance of that lease; the bill prayed the execution of the agreement.

The answer farther stated, that the Defendants to this bill appeared, and put in their answers, and the Defendants, the

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Masters and Fellows of *Jesus* and *Magdalen* Colleges, by their answers, submitted to the judgment of the Court, how far the agreement should be performed; that *Henry Foljambe* having died, the suit was revived against *John Foljambe* and *Henry Foljambe*, his executors: and, in 1670, a decree was pronounced, directing that the agreement should be performed, and that the Plaintiffs, according to their several interests, should hold and enjoy the manor and all the lands in *Toton*, in which they had any interest, and not set out to the Defendants, and also the lands allotted to the Plaintiffs by the agreement, discharged of tithes for ever, and of the yearly payments to the minister and schoolmaster of *Chesterfield*, and to the colleges, and of all fee-farm rents chargeable on the rectory; and, that in lieu thereof, *Warren* should convey and settle the lands offered for security of the 60*l.* *per annum*, to the trustees, and that that sum should be paid according to the agreement; and that the trustees should convey the ancient glebe lands allotted by the agreement to *Warren*, and that the Defendants should enjoy the lands allotted to them, in lieu of the ancient glebe lands and common of pasture, as the glebe lands of the rectory; and the trustees were to be protected by the Court, for what they should do, in pursuance of the decree. It was also decreed, that, as well the whole rectory of *Adenborough* (the tithes and glebe in *Toton*, and such other lands as were the Plaintiffs', and which they were to have by the agreement, and in pursuance of the order and decree excepted,) as the 60*l.* *per annum*, to be secured in lieu of the tithes of *Toton*, and the lands set out, or to be set out, for security of the 60*l.* *per annum*, and in lieu of the rectory in *Toton*, should for ever stand charged and liable, in the hands of the trustees, their heirs and assigns, to the payment of the several sums to the several persons therein-mentioned, respectively, and the residue of the profits of the rectory, and of the 60*l.* *per annum*,

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and the lands set out for the glebe in *Toton*, should be for ever employed and disposed of for the relief of the poor of the parish of *Chesterfield*, according to the intent of the will of *Godfrey Foljambe*.

The answer farther stated, that conveyances were afterwards executed, dated the 12th and 13th of *September* 1673, by which *Arthur Warren*, and his surviving trustee *Shuter*, conveyed to the trustees of the charity the lands set out for them, according to the agreement, together with the other premises intended as a security for the payment of the 60*l.* *per annum*; and the trustees of the charity assigned to *Warren*, for a term of nine hundred and eighty years, (being the residue of his term of one thousand years,) the glebe lands of the rectory lying in *Toton*, together with the tithes of the lands belonging to *Warren*; and the inheritance of the glebe lands and tithes was conveyed by the trustees to *Shuter* and his heirs, in trust, for *Warren* and his heirs, the trustees covenanting for quiet enjoyment of the lands and tithes.

The answer also stated, that *Arthur Warren*, and those claiming under, or in trust for, him, took and had ever since retained possession of the lands and tithes, and had regularly paid the 60*l.* *per annum*, in lieu of tithes, and the trustees had possession of the lands conveyed to them; and that the manor and estates of *Arthur Warren* had become vested in the Defendant, Sir *John Borlase Warren*.

The sum of 60*l.* *per annum* was accepted by the trustees in lieu of tithes, down to the 11th of *October* 1814, but a tender, on the 6th of *April* 1815, of the sum then due, was refused.

The answer submitted, that the trustees were bound

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by the agreement and decree; and that the compensation for the tithes was not inadequate.

Mr. *Wetherell*, Mr. *Horne*, and Mr. *Dowdeswell*, for the information.

The original transaction, in effect an absolute alienation of charity estates, at a fixed rent, is a gross breach of trust, and cannot prevail in this Court. *Attorney-General* v. *Green* (*a*), *Attorney-General* v. *Owen* (*b*), *Attorney-General* v. *Griffith* (*c*), *Attorney-General* v. *Backhouse.* (*d*) From the earliest times, leases granted by trustees of a charity, at an undervalue, have been rescinded. *Wright* v. the *School* of *Newport Pond* (*e*), *The Inhabitants of Eltham* v. *Warreyn* (*f*), and other cases in *Duke.*

The decree of 1670, on which the answer insists, is not an effectual confirmation of the previous transaction. That proceeding was a fraudulent contrivance for obtaining the sanction of the Court to a voluntary agreement. The suit was not adverse; no inquiry was directed whether the contract was beneficial to the charity; the Attorney-General was not a party; as against him, it is *res inter alios acta.* A decree, in such a cause, is an imposture. (*g*) In the case of *Hemsworth* Hospital

(*a*),

(*a*) 6 *Ves.* 452.
(*b*) 10 *Ves.* 555.
(*c*) 13 *Ves.* 565.
(*d*) 17 *Ves.* 283.
(*e*) *Duke*, Law of charitable uses, 46.
(*f*) *Duke*, 67., see *Attorney-General* v. *Magwood*, 18 *Ves.* 315., and the authorities there cited, and *Attorney-General* v. *Wilson*, 18 *Ves.* 518.

(*g*) The counsel here cited the following passage from the argument of the Solicitor-General *Wedderburne*, on the Duchess of *Kingston*'s trial: — "A sentence obtained by fraud and collusion, is no sentence. What is a sentence? It is not an instrument with a bit of

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(*a*), a decree by the Master of the Rolls, was, in a subsequent suit, treated as a nullity; and in the *Attorney-General* v. *Cholmley* (*b*), a decree, confirming an agreement between a rector and the parishioners, for an exchange of lands, and an annual pecuniary compensation, in lieu of tithes, was set aside, notwithstanding an acquiescence of eighty years. In *Sellers* v. *Dawson*, Lord *Thurlow* considered an irregular order a nullity. (*c*) It is clear that length of time is not a bar to a claim on behalf of a charity. The fact, that the property has passed through the hands of many tenants, creates no objection; they are not charged. The only defence to a suit like the present, is purchase for a valuable consideration without notice, of which here is no pretence.

(*a*) *Blackston* v. *The Hospital of Hemsworth*, *Duke*, 49.; see a farther account of the case in *Watson* v. *Hinsworth Hospital*, 2 *Vern.* 596. *Watson* v. *The Master*, &c. *of Hemsworth Hospital*, 14 *Ves.* 524.

(*b*) *Amb.* 510. 3 *Burn's E. L.* 439. 3 *Gwill.* 914. 2 *Eden*, 301. 7 *Bro. P. C. Ed. Toml.* 34. and see *Jones* v. *Snow*, 3 *Gwill.* 1199. *Cartwright* v. *Colton*, 4 *Wood.* 88.

(*c*) 2 *Dick.* 738. 2 *Anstr.* 458. n.

of wax and seal of a court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper. A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit: there is no judge; but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question, and, to use the words of a very sensible civilian on this point: *Fabula, non judicium, hoc est; in scena, non in foro, res agitur.*" 20 *Howell's* State Trials, 478. 479.

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On the merits, therefore, the Attorney-General is entitled to a decree, nor does the form of the record present any obstacle to the administration of the justice of the case. It might have been more accurate to have amended the information after the answer was filed, by introducing an allegation of the decree, and charging fraud; but that was not necessary. The Attorney-General, suing on behalf of a charity, is not bound by the rules which prevail in ordinary suits. *Attorney-General* v. *Parker* (*a*), *Attorney-General* v. *Scot* (*b*), *Attorney-General* v. *Breton* (*c*), *Attorney-General* v. *Whitcley* (*d*), *Attorney-General* v. *Brooke*. (*e*) He cannot, indeed, claim indulgence to the prejudice of the Defendant; but the Defendant cannot be prejudiced by a decree on the facts stated in his answer: the record presents the same case, as if the information had been amended; a case substantially requiring relief. In the *Attorney-General* v. *Cholmley*, the information stated the decree; and prayed that it might be set aside, but it appears from the registrar's book, that the decree then pronounced contained no declaration to that effect, but, without referring to the former decree, treating it as a nullity, declared the rights of the parties in contradiction to it. (*f*) It cannot be necessary, therefore, to state the decree on the record.

(*a*) 1 *Ves.* 43.
(*b*) 1 *Ves.* 418.
(*c*) 2 *Ves.* 426.
(*d*) 11 *Ves.* 247.
(*e*) 18 *Ves.* 324, 325., and see 1 *Ves.* 72.

(*f*) "His Lordship doth order that the relator's information do stand dismissed out of this Court, as against the Defendant the Lord Bishop of *Lincoln*, with costs, to be taxed, &c., and doth order and decree, that it be referred to the said Master, to take an account of the value of the tithes which have accrued, arisen, and renewed, upon the several estates in the possession of the several Defendants, from the time of filing the said information;" with directions for taking the accounts and costs. Reg. Lib. A. 1764, fol. 531.

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Mr. *Hart*, Mr. *Bell*, and Mr. *Blenman*, for the Defendant.

No evidence has been produced to authorise the Court in pronouncing the summary decree proposed by this information, and directing an account of tithes as matter of course. For any thing that appears, the original transaction was valid; there is no proof of undervalue; it was not a mere lease, but a grant of tithes for a pecuniary consideration, accompanied by an exchange of lands. The Court will not rescind a contract in part. It is clear that absolute alienation may be consistent with a due administration of a charity estate. In a case, about seven years ago, a house near *Lewes*, in *Sussex*, the property of a charity, which had formerly produced a large income, by being let in apartments, having fallen into a state of dilapidation, which rendered it unproductive, and the charity having no funds to rebuild it, but the materials and scite being of considerable value, an information was filed, and the Master having reported that it would be for the advantage of the charity to sell the house, Sir *William Grant* directed a sale, on the authority of a decree by Sir *Thomas Clark*, or Sir *Thomas Sewell*, cited by Mr. *Hollist*. In the information against the corporation of *Exeter* (a), the Court refused to disturb subsisting leases, which, from a long course of dealing, it presumed to have been properly granted.

But on this record it is not competent to the Court to examine the validity of the original transaction. That question is concluded by the decree of 1670, which the information does not seek to affect. A decree may certainly be impeached for fraud, but the Plaintiff in a suit to that end, must put in issue, the decree and the facts

(a) *Attorney-General* v. *Cross*, 3 *Mer*. 524.

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from which he infers fraud. Orders and decrees remain in force till regularly discharged or reversed. *Wall* v. *Bushby* (*a*), *Boddy* v. *Kent.* (*b*) It was not necessary that the Attorney-General should be a party to that suit. He had no interest, and could have interfered only to secure a correct statement of the facts, which were correctly stated. The Court may give directions for the management of a charity, in a suit to which the Attorney-General is not a party. *Monill* v. *Lawson.* (*c*) The decision in the *Attorney-General* v. *Cholmley*, the case of an ecclesiastical rector, whose lease, as against his successors, was void by statute, is no authority for setting aside this decree; but it is a direct authority for our proposition, that it can be set aside, if at all, only on an information stating it, and praying that relief.

The proceeding in this case should have been by information and bill. Perhaps the distinction between the cases in behalf of a charity, which require respectively a bill, an information, or a bill and information, may be thus stated: where the object is not to decide a right, as merely to compel a party to account, the trustees may proceed by bill; to decide a right, the Attorney-General must be a party, and an information is necessary; where both those objects are combined, the proceeding must be by bill and information. In the present case the trustees are not parties; as relators, they are subject only to costs (*d*), but the Court, having them before it in that character alone, could not bind their interests, or compel them to convey. (*e*)

(*a*) 1 *Bro. C. C.* 484.
(*b*) 1 *Mer.* 361.
(*c*) 4 *Vin.* 500.
(*d*) Some cases concerning relators, are collected, ante, vol. i. 305. n.
(*e*) The substance of the remaining argument for the Defendant is stated in the judgment.

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The MASTER *of the* ROLLS.

Without finally disposing of this case, I will state my present view of the two questions into which it resolves itself; 1st, The validity of the transaction, independently on the form of the pleadings; 2dly, The fitness of this record, for the purpose of impeaching it.

On both these questions a principal feature of the case is, the decree pronounced in 1670, as affecting, as well the validity of the contract, as the form of the suit which seeks to impeach it. In that respect there is a novelty in this case, not found in any one of those cited at the bar. If the information sought to impeach a recent agreement in these terms, by trustees of a charity, admitting that the legal estate is absolutely theirs, and that they can convey it for ever, and conclude a contract, binding heir interest, and the charity, at law, the question in this Court always is, how far alienation absolute, or for a long term, shall prevail when accompanied with circumstances which amount to a breach of trust; that is, alienation not consistent with that provident administration which is incumbent on trustees of a charity? The principle that governs all the cases is this, that trustees are bound to a provident administration of the fund for the benefit of the charity. There is no positive law which says, that in no instance shall there be an absolute alienation. If so, even in the case of an inquiry under an order of the Court, whether alienation would be beneficial to the charity, being contrary to law it could not be good; but on many occasions, by the authority of the Court, alienation has taken place; as in the case mentioned of a decayed house, in which, after a reference to the Master to inquire, whether it was for the interest of the charity, the Court directed it to be disposed of. If contrary to law, the Court could not authorise the dis-

An absolute alienation by trustees of a charity, may be valid if beneficial to the charity.

 position;

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position: alienation, under the authority of the Court, would be as invalid as without it. These decisions, therefore, afford a conclusive proof, that alienation not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good; and disclose the principle on which any bill to rescind that alienation must proceed. So, in the information against the corporation of *Exeter* (a), the late Master of the Rolls was of opinion, that leases for three lives are not necessarily an unlawful alienation of charity estates; and being satisfied, that the value had been rightly estimated in the fine and rent, the duration of the leases did not, in his judgment, constitute an objection, when it appeared, that the trustees had not, *de novo*, introduced that mode of alienation, but merely followed the custom of the country; but that custom could not have authorised the alienation if contrary to law.

In *The Attorney-General* v. *Smith* (b), the Court sanctioned alienation, under a principle which it would be a little difficult to recognize at present. It appearing, on a reference to the Master, that the property of a charity had been recovered, in a great degree, by the activity of the party who sought a permanent interest in it, he was declared entitled to a lease renewable for ever. It cannot be taken, in contradiction to these examples, as an inflexible rule, that, in no circumstance whatever are trustees of estates, devoted to charitable purposes, authorised to alien, either absolutely or for long terms. The question therefore is, whether, under all the circumstances, the alienation is a breach of trust, or whether the contract was not for the benefit of the charity?

It appears here, that *Henry Foljambe*, the tenant of

(a) *Attorney-General* v. *Cross*, 3 *Mer.* 524.

(b) 2 *Vern.* 716.

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the rectory, having an interest, the extent of which we know not, had entered into an agreement, not confined to the subject of tithes, but by which he undertook to demise all the tithes of the manor, containing, as I understand, about 1200 acres, for the remainder of *Warren*'s term of 1000 years, accompanied by a further agreement relative to the glebe, (which seems designed to place the glebe lands together, according to the choice of the tenant of the rectory), and for seven acres in lieu of right of common. The exact nature of the rector's right of common, or his interest in the tithes, is not in evidence: or whether the owner of the lands might have claimed any exemption; it appears only, that in future, the rector was to receive 60*l.* a-year for tithes, that stipulation being accompanied by an exchange of lands relative to the glebe. Now, stopping here, and considering this agreement with modern impressions, an alienation of charity estates for 1000 years at a stationary rent, it is impossible to deny that it is a decisive breach of trust; not permitting the rector to avail himself of any change of times, but keeping his interest fixed in amount; the compensation which he received might be adequate at the date of the contract; but he was precluded, during 1000 years, from any advantage of increased value. It is true, that he was secured from diminution, and in some instances to guard against fluctuation, may be as much the interest of one party as of the other; but that would be an answer to all cases in which trustees have made an alienation at a fixed rent. It is not fitting for trustees to divest themselves of the power of profiting by change of value. The progress of events, and the depreciation of money, have shown the improvidence of this agreement; at the same time, it is just to say, that these principles do not seem to have been acted on at that early period, in 1670. There is no case produced, in which mere improvidence, inferred solely from the extent of the term, was held sufficient to rescind the

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alienation. In many cases in *Duke's* collection, the Court has acted on inadequacy of value; in none on mere extent of term; where the alienation appeared, at the time, to be a provident administration, an alienation for a value then adequate, the prospective possibility that it might become inadequate, does not appear, at that period, to have had the effect which it has at present. Lord *Eldon*, in 1801, says, that he can find no precedent for regulation of the judgment of the Court, having before it the case of a long lease of a charity estate (*a*), and in a subsequent case (*b*), although he states, that during the last twenty-five years no doubt had been entertained on that point; yet no express decision was produced, that a long term, without reference to value, is an improvident alienation.

I mention the fact to show that these trustees might not know that, in the judgment of the law, they were guilty of a breach of trust; but it is a different thing to say, whether the Court can retrospectively give validity to such a contract, and, with reference to modern principles, permit it to remain? That is a question of considerable difficulty; but whenever it can properly be considered, the point will not be merely, whether a demise of tithes for a thousand years at a fixed rent is a good administration of a charity, for it never can be just to consider a part of a contract and not the whole: in examining the conduct of the trustees, and deciding whether this was a provident administration of the property of the charity, the Court must advert not only to the tithes, but to the glebe, and, as far as it can, to all the circumstances.

Length of time, though not a bar, is certainly an ob-

(*a*) *Attorney-General* v. *Green*, 6 *Ves.* 452

(*b*) *Attorney-General* v. *Owen* 10 *Ves.* 555.

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stacle in the way of setting aside a contract made near a hundred and fifty years ago, and acted upon ever since, till the filing of this information. It creates a difficulty in ascertaining all the circumstances under which the agreement was made, and a strong case is required to justify the interposition of equity after such a lapse of time, at the instance of one of the parties, who may have enjoyed all the benefit of the contract for perhaps the whole, or a great part, of the interval, and who never could have been compelled, at the instance of the other party, to relinquish it, when, from an alteration in the relative value of money, the agreement has become disadvantageous to him. It is additionally difficult, in such a case, partially to set aside the contract, leaving the charity still to enjoy all the benefits of the other part of the transaction; and yet the information neither seeks, nor is properly framed, nor has the necessary parties, for a complete rescission of the whole agreement, and a restitution of both parties to their original rights, as they stood antecedent to the formation of it.

But I am not now required to decide these questions, and must not overlook the main feature of the case, that the contract was brought under the view of a court of justice, before it was executed. It is necessary to consider that proceeding.

The suit was instituted by *Warren* against the persons who had entered into the contract, with the addition of the overseers of the poor, and all other parties interested. Was there any omission fairly to disclose to the Court the nature of the contract? Was the Court fully possessed of what constituted the objection, namely, the length of time and the fixed rent? These are prominently stated in the pleadings, and there needed no reference

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reference to the Master to ascertain the fact of the agreement, to let the tithes belonging to the charity at 60*l.* a-year for a thousand years; the trustees submit to act under the authority of the Court; it was stated, that such an agreement had been made by their tenant, but was not binding on them, and intended to be binding or not as they approved; by their answer, they submit to the judgment of the Court how far the agreement should be performed. The Court, on debate and hearing what could be alleged, declared that it ought to be performed, and that the trustees should be protected in the performance. What could the trustees do after this decree was pronounced? Could they refuse to execute the deeds in conformity to the decree, when ordered by the Court to execute and convey, and protected by it? Am I to assume, that the Court lent itself as ancillary to a fraud and breach of trust? If there were a breach of trust, it was committed by the Court, which, with perfect knowledge of what constitutes the alleged breach of trust, the length of term, and fixed amount of rent, ordered the agreement to be carried into execution. In considering the propriety of this contract, am I not bound, in deference to the Court, to suppose, that it was satisfied that there was not a breach of trust; that the agreement and the decree were proper? I must presume *omnia ritè acta.* It is said, that the Court did not direct a reference to the Master, to see whether the contract was for the benefit of the charity. Was such a reference according to the course of practice at that time? If the contract were void by reason of its duration, no circumstance could give validity to it. I am bound to suppose, that the Court was satisfied on these points before it pronounced the decree. Three years after the decree, the trustees executed the agreement. The question here will be not a mere abstract question, whether trustees

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can, in any case, alien or demise for a long term, but whether alienation with the knowledge and under the decree of the Court, can by a succeeding Court be pronounced a breach of trust? That is quite a new feature in the case, and if, in modern times, trustees constantly alien when proper means have been employed to ascertain that it is beneficial to the charity; why are we to presume here, that the Court did not take measures to inquire whether this alienation was for the benefit of the objects of the trust? Admitting that the Court was mistaken, was there a breach of trust in the trustees? When the Court orders a conveyance, is that a mere nullity?

It is said, that the proceeding on the face of it is a fraud. Fraud is *aliud actum aliud simulatum*, concealment, pretended hostility. Here the parties state openly, that they approve the contract, specify its terms, and submit it to the Court. This is an agreement for a long term, and at a fixed rent, but executed under the sanction of the Court; and it must always be considered with reference to that circumstance, a most important circumstance whenever the question comes to be decided. Without anticipating the decision, I think that there will be great difficulty. It must be remembered, that this is not the case of mere alienation, but of trustees calling for the aid and sanction of a Court to guide them, and what they do is the act of the Court. It seems difficult to give to such a transaction the character of a fraud, or breach of trust; and it is on that ground only, that the legal right can be qualified in equity.

Whether the rule is so imperative, that to alienation for so extensive a term no circumstance can give validity,

dity, no length of time, no acquiescence, no sanction of a Court, but that it is a manifest breach of trust in the Court and all parties concerned, is a question on which I express no opinion, because it seems to me, that the case is not now in a shape in which it is possible to form a decision. The proceedings in the former suit are wholly omitted in the information. Is the Court to investigate this transaction, without having put in issue that which constitutes the most important circumstance for establishing its validity? This information attempts to set aside a decree, without putting it in issue; praying that the lease may be cancelled without naming a decree under which it was executed. It is said that the suit was fraudulent. Those who impeach it must put it in issue, and state from what its invalidity arises. Is the Court to annul a decree for fraud, without the statement of a single circumstance of fraud? Was any case ever heard of, in which, after a solemn decree directly on the very subject, with jurisdiction to bind the inheritance, with parties to be bound, and binding it in express terms to the full extent of the interest, another Court, at the distance of a century and a half, determined the contrary? One judgment confirming, the other annulling, the same contract; two inconsistent determinations on the records of the same court; the first decree, commanding the trustees to execute the contract, and the subsequent decree, without the least notice of the former, declaring the contract void? Whether the decree in this case can be impeached for fraud is a distinct question, but this suit does not seek to impeach it.

The case of *Hemsworth* Hospital cannot assist the present information. The history of the proceedings in that case is given in *Watson* v. *The Master, &c. of Hemsworth*

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worth Hospital (*a*); and it appears, that the hospital was restrained by its constitution from granting leases for more than twenty-one years; and all the decrees proceeded on that foundation.

In suits on behalf of charities, the Court will not allow informalities prejudicial to the Defendant.

It is then said, that the *Attorney-General* was not a party, and that an information in behalf of a charity is not to be dismissed for defect of form. To a certain extent that doctrine is well founded; the Court will grant relief according to the case made, as it appears on the whole record: but what appears on this record? That there was a decree, in 1670, approving the agreement, and directing its execution; but no suggestion of fraud; that allegation is extrinsic to the record. All the cases show, that the Court is careful not to do injury to defendants, by overlooking error in form. Would no injury be done here? The information denotes no intention to attack the decree; and can the Court permit the Attorney-General to raise a question in argument not put in issue in the pleadings? The record presents nothing to impeach the decree, the information not touching, or affecting to touch it; there is, therefore, a subsisting decree on the very point; how can the Court over-rule it without at least putting it in issue? The counsel for the information insist, that this was done in *The Attorney-General* v. *Cholmley* (*b*), and other instances. Certainly, decrees in cases of ecclesiastical rectors have not prevailed against objections in modern times; but an ecclesiastical rector cannot, since the disabling statutes, even with the consent of the patron and ordinary, grant a lease for more than three lives; such leases, and all judgments intended to support them (*c*), are expressly declared void. That is not the case with trustees of a charity; they have

(*a*) 14 *Ves.* 324.

(*b*) See the reference *ante*, p. 298. n.

(*c*) Stat. 43 *Eliz.* c. 9. s. 8.

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the legal fee, not an estate for life like an ecclesiastical rector; whether beneficial or not beneficial, whether for the interest of the church or not, his contract, exceeding twenty-one years, is void by statute, as against his successors. No decree, therefore, could give validity to it beyond the interest of the parties. In *The Attorney-General* v. *Cholmley*, the agreement and the decree bound the party, but not his successors, and, with respect to them, was void on every principle of law. In that case the information impeached the validity of the decree, and prayed that it might be set aside. The whole merits of that decree were in issue, and the Defendant was apprised that the Plaintiff sought to impeach it; but the case fails, in application to the present, because it is impossible for any Court to give validity to a contract contrary to an act of Parliament, while a contract like this may be established by judicial authority. A lease for 150 years by an ecclesiastical rector, would be as void after the decree as without it.

In this case the decree was not made, like the decree in *The Attorney-General* v. *Cholmley*, in confirmation of the agreement; but expressly directed the performance of it, by the trustees, who were not previously bound by it, after the trustees and the other parties had transferred to the Court the responsibility, and had prayed, what they obtained, the sanction and indemnity of the Court.

As to the Attorney-General not being a party, he has no interest: his office is, to see that those who have the legal estate duly administer the property; but he would be no party to a conveyance, the legal fee being in the trustees, who are competent to convey. It is not necessary that the Attorney-General should be a party to a contract on this subject. It would, indeed, have been more

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more fit had he been a party to the suit; but if not, is the decree a nullity, and to be totally laid aside, the information not seeking to impeach it on that ground? If the information impeached the decree for want of proper parties to represent those interested, such a charge might require an answer from the Defendant, and inquiries how the decree could be sustained; but the difficulty here is, supposing every fact in favor of the trustees, to overthrow a positive decree, not impeached by the record, and pronounced directly on the contract. It seems impossible to sustain the information as at present framed.

July 30.

The Master of the Rolls intimated, that he retained the opinion which he had expressed on the hearing.

Bill dismissed without costs.

Reg. Lib. A. 1817, fol. 2124.

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ARCHIBALD KENNEDY, and HANNAH ELEANORA KENNEDY, Infants, by GEORGE ROBINSON, their next Friend, - PLAINTIFFS.

ARCHIBALD EARL of CASSILLIS, ARCHIBALD LORD KENNEDY, and ELEANOR, his Wife, JAMES FARQUHAR, GEORGE HIBBERT, and JOHN INNIS, and HANNAH ALLARDYCE (out of the jurisdiction), and the GOVERNOR and COMPANY of the BANK of ENGLAND, DEFENDANTS.

July 15.

Injunction to restrain proceedings in the Court of Session in *Scotland*, dissolved under the circumstances.

THE bill stated a deed of nomination dated 14th *July* 1800, executed by *Alexander Allardyce* of *Dunnottar*, in the county of *Kincardine*, nominating his wife, *Hannah Allardyce*, his brother, *James Allardyce*, since deceased, *James Farquhar*, *George Hibbert*, and *John Innis*, and the survivor, tutors and curators to his daughter, *Eleanor*, during her minority, and that *Alexander Allardyce* having died in *November*, 1801, his daughter *Eleanor* being an infant, leaving real estates at *Dunnotar*, and personal estate, consisting, principally, of 30,000*l.* stock of the Bank of England, the tutors and curators proved the deed of nomination or testamentary writing in the prerogative court of the Archbishop of *Canterbury*, and the bank stock was transferred into their names.

The bill then stated, that some part of the personal estate had been invested in the purchase of real estates, and that, at the time of filing the bill, there remained standing in the names of the four surviving curators, 15,300*l.* bank stock; a farther sum of 3825*l.* like stock, arising from dividends accrued due on the former, since *Eleanor Allardyce* attained the age of twenty-one, standing in the name of *Alexander Allardyce*.

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The bill farther stated, that about the end of the year 1813, the Defendant, Lord *Kennedy*, eldest son of the Defendant, the Earl of *Cassillis*, then nineteen years of age, paid his addresses to *Eleanor Allardyce*, then about seventeen; that after some proposals between Lord *Alloway*, as the friend of the Earl of *Cassillis*, and *Innis*, to which the Earl refused to accede, the curators prepared a memorandum, dated the 17th of *March*, 1814, containing distinct proposals relative to the terms of the settlements, to be executed previous to the marriage, which, having been approved by *Eleanor Allardyce*, was delivered to the Earl of *Cassillis*, who, on the 25th of *March*, handed over to *Farquhar* a paper, in his own hand-writing, stating objections to several of the articles; that the Earl afterwards proposed certain modifications, to which three of the curators, then in *London*, acceded; but, on the 6th of *April*, the Earl intimated that he had some objections, and, on the 9th of *April*, addressed a letter to *Farquhar*, a part of which was in the following words: "Upon delivery of your propositions, matters to me wore so unfavourable an aspect, and being determined as to my line, in so far as I comprehend the propositions, I immediately sent for Lord *Kennedy*, delivered to him the whole of the papers or copies, and desired that he would himself go and talk over the matter with Miss *Allardyce* herself. I presume he is at *Dun*, or *Dunottar*, about this time. I see no probability of my doing any good."

The bill, alleging that the Earl of *Cassillis* had formed a design, that Lord *Kennedy* should marry Miss *Allardyce*, without any settlement being previously executed, further stated, that Lord *Kennedy*, on his arrival at *Dun*, where Mrs. and Miss *Allardyce* were then resident, represented to them, that *Farquhar*, *Hibbert*, and *Innis*, had proposed terms to the Earl to which he had declin-

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ed to accede, but had laid before the curators his final propositions, on the basis of which he wished settlements to be prepared, and Lord *Kennedy* produced what he alleged to be a copy of such final propositions, (the bill charging, that no such final propositions were ever sent by the Earl to the curators,) and obtained the consent of Miss *Allardyce* and her mother thereto, assuring them, as he was authorised and instructed by the Earl, that settlements should be prepared, and were then in preparation, according to the terms of those propositions; that, in the faith that proper settlements would be executed on the 1st of *May*, 1814, Miss *Allardyce*, without the concurrence of her curators, married Lord *Kennedy*, and that no settlement of her property had yet been executed.

The bill, submitting that the curators ought not to transfer the 15,300*l.* bank stock, or to part with any of the property vested in them by the deed of nomination, until a settlement thereof had been made, in pursuance of the agreement, further stated, that Mrs. *Allardyce*, *Farquhar*, and *Hibbert*, intended to join in a transfer of the stock, and, altogether to divest themselves of the trusts reposed in them by the deed of nomination; and, that *Innis*, having declined joining in such transfer, or otherwise divesting himself of the trust, Lord and Lady *Kennedy*, in *November* 1817, caused a summons of the Court of Session, in *Scotland*, to be executed, and levied upon him, concluding, that *Innis* ought to be ordained and decreed to deliver to Lady *Kennedy* powers of attorney, to enable the Bank of *England* to transfer into her name, that part of the bank stock which belonged to her, and to execute and deliver all necessary conveyances and dispositions of her lands, and other estates and effects, or, in case he should decline so to do, that he should be decreed to pay to the pursuers 100,000*l.*, as the value of the stock and lands.

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The bill prayed, that the Earl of *Cassillis*, and Lord and Lady *Kennedy*, might be decreed to execute settlements, in conformity with the memorandum or proposals of the 17th of *March* 1814, subject to the modifications before mentioned, or on the terms of the final propositions alleged, by the Earl of *Cassillis*, to have been laid before the curators, and, to that end, that the Earl and Lord *Kennedy* might make discovery of such proposals, and that all necessary directions might be given for effectuating the said purposes; and that, in the mean time, Lord and Lady *Kennedy* might be restrained, by injunction, from proceeding in the summons, or to an action in the Court of Session, or from commencing or prosecuting any action or suit at law, or otherwise, against *Innis*, in respect to any of the matters aforesaid, and that the Governor and Company of the Bank of *England* might also be restrained from making any transfer of the sums of 15,000*l.* and 3825*l.*, or any part thereof, without the order of the Court.

In the *December* 1817, the Plaintiffs, on an affidavit of *Innis*, verifying the allegations of the bill, moved that the Defendants, Lord and Lady *Kennedy*, might be restrained by injunction "from proceeding in the said summons, or to an action or suit at law, or otherwise, against the said *John Innis*, in respect to any of the matters aforesaid, and that the Governor and Company of the Bank of *England* might also be restrained from making any transfer of the said two several sums of 15,300*l.*, and 3825*l.*, or any part or portion thereof, without the order and direction of this Court; which, upon hearing the said affidavit and the six clerks' certificate read, is ordered accordingly, until the Defendants shall appear to, and fully answer, the Plaintiffs' bill, or this Court make other order to the contrary."

Reg. Lib. A. 1817, fol. 134. 17th *December* 1817.

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The answer of the Earl of *Cassillis* expressed a belief that none of the curators had consented to the modifications of their proposals suggested by him, and stated, that they afterwards made new proposals, materially different from the modified proposals; and that the Earl rejected their propositions, and thereby ended all communication with them; denied a design, that Lord *Kennedy* should marry Miss *Allardyce*, without any previous settlement; and stated, that the Earl communicated to Lord *Kennedy* his final proposals, and advised him to submit them to Miss *Allardyce* and her mother; and that, as he believed, Lord *Kennedy* assured Miss *Allardyce*, that settlements should be prepared in conformity to them, an assurance which he was authorised by the Earl to make. The answer farther stated, that a settlement had been executed on the 28th of *November* 1814, between Lord *Kennedy*, with the consent of the Earl on the one part, and Lady *Kennedy* on the other part, the particulars of which were set forth, and which the Earl believed to be in exact conformity to the propositions made by him to the guardians.

The answer of Lord and Lady *Kennedy* was to the same effect.

On this day a motion was made to dissolve the injunction. *July* 15.

Sir *Samuel Romilly* and Mr. *Abercromby* for Lord and Lady *Kennedy*, and Mr. *Pemberton* for the Earl of *Cassillis*, in support of the motion.

The merits of the case are not now in question, but it may be useful for the Court to understand, that the ac-

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tion in the Court of Session is designed to compel, not merely a transfer of the bank stock, but an account of Mr. *Innis*'s transactions as trustee.

On general principles, this injunction cannot be sustained. The Court of Session is an independent foreign tribunal, of competent jurisdiction, subject to appeal only, like this Court, to the House of Lords. The parties are domiciled in *Scotland*; the marriage was celebrated, and the property, as far as it has locality, is situated there. The question must be decided by the law of *Scotland*. The action, commenced in the Court of Session, enables that Court to administer complete justice among the parties; if the Defendant, *Innis*, has a good defence, he may there avail himself of it; any objection to the settlement may be there considered. This Court is bound to presume, that foreign tribunals will proceed regularly, and administer the justice of the case. There is no precedent of an injunction to restrain proceedings in an action in the Court of Session. Even if confined to the transfer of the bank stock, the injunction must be dissolved, as impeding the proceedings of a tribunal of competent jurisdiction. The Court of Session is a court of equity; and this Court never restrains proceedings in courts of equity, as the exchequer. In the suit instituted here, *Innis* cannot be compelled to account. If the Court of Chancery, by injunction, restrains proceedings in the Court of Session, that Court may, by interdict, restrain proceedings here, and the party will be unable to sue in either country. An article of the act of Union expressly prohibits such an interference with the jurisdiction of the Court of Session; declaring, "that no causes in *Scotland* be cognisable by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in *Westminster* Hall; and that the said Courts, or any other of the like nature,

nature, after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same. (a)

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The case presents two questions; 1st, Whether this Court has jurisdiction of the subject in dispute? 2d, Assuming that, whether it can interpose to restrain another Court which has jurisdiction also? That this Court has jurisdiction, I cannot doubt; but that will not authorise me in restraining another Court of competent jurisdiction.

The *Solicitor-General* and Mr. *Cullen*, for the Plaintiffs, against the motion.

The object of this suit is to prevent Lord *Kennedy* obtaining possession of the bank-stock standing in the name of the curators, without executing a proper settlement.

It is clear that this Court possesses concurrent jurisdiction. At the period of these transactions, Lord *Cassillis* was resident in *England*, the agreement was made in *London*, and part of the property, the bank stock, is here; the curators obtained possession of that stock in the character of executors in *England*. The Court of Session has no power to restrain the bank from transferring the stock; and that important object of the present suit cannot be accomplished by the suit in *Scotland*. During six months the parties have acquiesced in the injunction.

Mr. *Hart*, for the Defendants *Farquhar*, *Hibbert*, and

(a) 5 *Ann.* c. 8. art. 19.

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nature, after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same. (a)

The LORD CHANCELLOR.

The case presents two questions; 1st, Whether this Court has jurisdiction of the subject in dispute? 2d, Assuming that, whether it can interpose to restrain another Court which has jurisdiction also? That this Court has jurisdiction, I cannot doubt; but that will not authorise me in restraining another Court of competent jurisdiction.

The *Solicitor-General* and Mr. *Cullen*, for the Plaintiffs, against the motion.

The object of this suit is to prevent Lord *Kennedy* obtaining possession of the bank-stock standing in the name of the curators, without executing a proper settlement.

It is clear that this Court possesses concurrent jurisdiction. At the period of these transactions, Lord *Cassillis* was resident in *England*, the agreement was made in *London*, and part of the property, the bank stock, is here; the curators obtained possession of that stock in the character of executors in *England*. The Court of Session has no power to restrain the bank from transferring the stock; and that important object of the present suit cannot be accomplished by the suit in *Scotland*. During six months the parties have acquiesced in the injunction.

Mr. *Hart*, for the Defendants *Farquhar*, *Hibbert*, and

(a) 5 *Ann.* c. 8. art. 19.

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Innis, submitted to the direction of the Court. Sir *Arthur Piggott* for the Bank.

The LORD CHANCELLOR.

The bill is filed by the next friend of two infants, whom it represents to be English domiciled infants, against Lord *Cassillis*, and Lord and Lady *Kennedy*, none of whom it treats as out of the jurisdiction, not describing them as English, or as Scottish domiciled subjects; against *Farquhar*, against *Hibbert*, who live in *London*, against *Innis*, who lives in *Scotland*, no one of whom is charged to be out of the jurisdiction; the only person so described is Mrs. *Allardyce*. The bill states the right which it supposes the infants have to a settlement for their benefit, (a right, to a certain extent, unquestionable,) and thus treating the parties as resident in *England*, except Mrs. *Allardyce*, proceeds to state the agreement made with respect to Scottish property, and also property, which, if it cannot be denominated Scottish, or English, must be administered by persons not subject to process of the Court of Session, namely, the Bank of *England*, and alleges, that the proceedings in the Court of Session were fraudulent and collusive, between the principal Defendant and others, including *Innis*, in whose name the stock stands.

The difficulties in the case, I certainly think, are not provided for by the act of union; difficulties arising from transactions between persons resident in different parts of the island. We have a Court here which cannot affect persons resident in *Scotland*, and a Court there which cannot affect persons resident here. It appeared to me right to grant the injunction, on the allegation, that the suit in *Scotland* was collusive. I do not interfere with the merits, deciding on a principle which must regulate the jurisdiction of the Courts with regard to each other.

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The injunction has been construed somewhat too largely by Sir *Samuel Romilly*; but I think it expressed so as to be understood to go much farther than the Court designed. I certainly meant to go no farther than the bank stock and purchased estates; the stock standing in the Bank of *England*, which the proceedings of the Court in *Scotland* cannot affect, and, in the names of persons, three or four of whom are not bound to give effect to the suit in *Scotland*, more especially if they are not parties to it.

The suit in *Scotland* is of this kind. Lord and Lady *Kennedy* bring before the Court no person but *Innis*, and state, that other persons (for whom, I suppose, Mr. *Hart* has asked instructions how to act, which I cannot give them) have been colluding with him, and divested themselves of the purchased estates, and confine their prayer to relief against *Innis*, calling on him to account, and concur in executing powers of attorney and making conveyances. Taking the Court of Session to be a court of law and of equity,* which it is (*a*), yet, whether the property is to be administered according to English or Scottish notions of equity, which, in many material points, differ, must depend, when the cause is heard, on the national character of the individuals, and the character of the property which the decree affects; and it may happen, that the relief given in the Court of Session, is not exactly the same as that given here. Supposing a bill filed in the Exchequer against all the trustees, call-

The Court of Session is a court of law and of equity.

Circumstances of a suit which determine the national law to be administered.

e session may proceed as a court of equity by the rules of conscience, in abating the rigor of law, and giving aid, in proper cases, to such as in a court of law can have no remedy; and this power is inherent in the supreme court of every country, where separate courts are not established for law, and for equity." *Erskine, Principles of the Law of Scotland*, b. i. tit. 3. p. 29.

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ing on them to convey to the absolute use of Lady *Kennedy*, if that bill were dismissed, the decree so pronounced would not be such that the parties could have the benefit of it, in a suit instituted to protect the rights of the children. There might therefore be two suits proceeding in this country, and a dismission of a bill in the Court of Exchequer, while the Court of Chancery is going on to give relief; but that is not the view in which this case must be considered. It now appears that the suit in *Scotland* is *bonâ fide*, and the injunction is sought, stands, but against the Court of Session, which never can be made effectual. If you think proper, and you are not against the persons in whose name this bank stock entitled to ask for an injunction against individuals, that suit never can do you harm. I say nothing on the merits. The other trustees, not parties in the Court of Session, are parties in this Court, and must take notice of what passes here. If they choose, in case *Innis* is ordered by the Court of Session to transfer, to act in conjunction with him, it may be proper; but you might move to restrain them from joining, which would not interfere with the proceedings in that Court; but that must be by injunction against the Bank; for, though I have had a good deal of difficulty in saying that you have a right to dissolve the injunction against the Bank, who are not amenable to the jurisdiction of the Court of Session, yet, if the Plaintiffs are entitled to an injunction against the Bank, I think it would be more properly asked in a suit to which the trustees are parties.

The act of union is sacred; but I doubt how it is possible to apply the article cited to a case in which justice cannot be administered, unless the courts of both countries assist the parties. It is true, this court cannot "cognose, review, or alter the acts" of the Court of Session;

Session; but it will be difficult to do justice, unless the courts in *England* aid the courts in *Scotland*, and the courts in *Scotland* aid the courts in *England*.

The injunction must be dissolved; but I desire it to be understood, that the dissolution will not authorise the trustees, not parties to the suit in *Scotland*, to join in any transfer or conveyance.

* "Whereas, by an order made the 17th day of *December* 1817, it was ordered, that an injunction should be awarded to restrain the Defendant, *Archibald* Lord *Kennedy*, and *Eleanor*, his wife, under the penalty of 100,000*l*., to be levied upon their lawful goods and chattels, from proceeding in the summons, or to an action in the Court of Session, and from commencing or prosecuting any action or suit at law or otherwise, &c." (*Ante*, p. 316.) "His Lordship doth order, that the said injunction do stand dissolved, and that the Plaintiffs do pay to the Defendants, the Governor and Company of the Bank of *England*, their costs of this application to be taxed, &c."

Reg. Lib. A. 1817, fol. 1617. (*a*)

(*a*) An injunction to restrain proceedings in the Court of Session was granted in *Wharton* v. *May*, 5 *Ves.* 27., see p. 71.; and recently in *Bushby* v. *Cloves*, 5 *Madd.* 297.; and see Lord *Portland*'s case; and *Grey* v. *The Duke of Hamilton*, cited *Eden* on Injunctions, p. 142.; but in *Lowe* v. *Barker*, 1 *Ca. in Cha.* 67. *Nels.* 103. 2 *Freem.* 125., an injunction to restrain proceedings in a foreign court, was, after great consideration, refused. A suitor here, proceeding for the same matter in a foreign court, will be compelled to elect between the two jurisdictions, *Pieters* v. *Thompson*, *Coop.* 294.

The following cases, illustrative of the doctrine discussed in *Kennedy* v. *Lord Cassillis*, are extracted from Lord *Nottingham*'s MSS.

"21st *February*, 28 *Car.* 2, 1675-6, Sir *George Carteret* v. Sir

On a bill for a partition of lands in Ireland, and an

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account of waste committed there, a demurrer was allowed as to the partition, and overruled as to the account.

Sir *William Petty*. The bill set forth, that the Defendant had bargained and sold to the Plaintiff, a moiety of certain lands in *Ireland*, and that he did there cut down the woods, and commit other waste, and so prayed an account, and a partition: the Defendant demurred, because the freehold and inheritance of lands in *Ireland* ought not to be settled here. I ordered him to answer as to the account, but allowed the demurrer as to the partition; for wheresoever the Defendant may, by personal coercion, be compelled to perform the act decreed, there after answer put in, the Court shall proceed to a decree though the Defendant be in *Ireland*, and rely upon the justice of the King to compel him to be sent for over, to yield obedience, as was done in Alderman *Preston*'s case of *Dublin*, and advised to be done by the council table, in the Earl of *Thomond*'s case; for, otherwise there must be a failure of justice; because, in *Ireland* they are not bound to execute the decrees of *England*, upon a bill there preferred to have such execution, as was lately resolved in *Ireland*, and very justly, in the case of one *Savage*, and since in the case of the Earl of *Thomond*. And so it was resolved long since at the common law, that if a man be outlawed in *England*, and flee into *Ireland*, no *capias utlagatum* can follow him thither; of which see some ancient records in my manuscripts of Mr. *Noy*'s Collection, fol. . And if it be said the Plaintiff may go over into *Ireland* and exhibit a new original bill against the man there, it is equal to a failure of justice; for by that time the case is well advanced there, the man may flee again out of *Ireland* into *England* or *Scotland*, so that there can never be any certain justice, but in the absolute power of the King, which can bring all his subjects into the proper place where they ought to render reason. But all this is to be understood of such cases where the imprisonment of the person is the most proper means to effect that which is decreed to be done, viz. the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his, can sufficiently execute such a decree, there it is in vain to hold such a plea; and that is this case: For, to a partition in Chancery it is necessary to award a commission to some neighbouring justices to divide the lands; if they refuse, there lies an attachment against them for such refusal; if they execute the commission

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sion and return it, then there ought to be a decree, that the lands be accordingly conveyed, and that, till a conveyance, they may be so enjoyed; the consequence thereof is a sequestration, and an injunction for the possession, and a writ of assistance to the sheriff: none of all which can be awarded into *Ireland*, nor supplied by the obedience of the person imprisoned here. So far the demurrer is good. (*a*)

A partner, having retired under an agreement of indemnity against partnership claims, was allowed a sum of money recovered by the sentence of a foreign court for customs, without examination of the merits.

" *January* 28*th*, 30 *Car.* 2. 1678-9., *Gold* v. *Canham*. The Plaintiff had received some money by bill of exchange, which belonged to the Defendant, but detained it in his hands upon pretence of some accounts between them, and being sued at law, exhibited his bill in this court to stay that suit; and because *Canham* was supposed to be insolvent, *ergo*, for want of other security, the money in question was brought into court, to abide the event of the cause at hearing: and now the scope of the Plaintiff's bill appeared to be a prayer of relief, upon an agreement made at the determination of a co-partnership; for the Plaintiff, being at *Leghorn*, had entered into a co-partnership with *Lee* and *Canham* in thirds, and being desirous to break off, it was agreed that 27,000 pieces of eight should be paid to the Plaintiff, which was done; and further, that the Plaintiff should be indemnified from any trouble which might happen to him, by reason of that co-partnership; and, in 1664, an instrument was drawn, and sealed accordingly. After this, the Plaintiff entered into a new co-partnership with *James Gold* and *John Gold*, and was forced, by sentence of the Court at *Florence*, to pay custom to the Great Duke, for goods imported during the time of the former co-partnership, and is also sued there, at this time, by *Mico*, for a debt due from that co-partnership, where the cause is still depending. To which the Defendant said, that there were no customs due to the Duke of *Florence* after seven years, and that *Mico*'s pretences were groundless, and that there had been a reference of all differences to arbitrators, before whom the matter of the customs was not stood upon. *Cur.* 1, Let the Plaintiff receive back so much of the money brought into Court as may be adequate to the

(*a*) *Cartwright* v. *Pettus*, 2 *Ca. in Cha.* 214.

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No appeal from a sentence of the delegates to the Lords in Parliament.

sum paid on the sentence for custom, the justice whereof is not examinable here. 2, Let the Defendant take the rest, subject to the covenants of saving the Plaintiff harmless against *Mico, &c.* (*a*)

"*June* 10, 30 *Car.* 2. 1678. Mr. *Cottington* presented a petition to the Lords in Parliament, praying to be relieved against a sentence given by the delegates in a matrimonial cause, wherein they adjudged, as the Court of the Arches had done before, that one *Signora Angela Margarita Gallina*, a very lewd woman, was the petitioner's lawful wife, and lawfully married to him at *Turin;* whereas, in *Turin*, she hath another husband yet living, and, though she were divorced from that husband by the sentence of the Archbishop of *Turin*, before the pretended marriage to the petitioner, yet he doubted not, but to make it appear, that this sentence was void, and the divorce null, and that she did still remain the wife of her husband at *Turin*, though he were also married to another wife, before the pretended marriage of the petitioner.

I said, the merits of this case, if the petitioner could come at it, were to examine a sentence of the Archbishop of *Turin*, by the laws of *England;* for, as we know not the laws of *Savoy*, so, if we did, we have no power to judge by them; and, *ergo*, it is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences. In *Wytred's* case, 5 *Jac.* (*a*), a judgment given in *Holland*, for debt, was executed here, by the Admiralty of *England*, upon the person who fled from execution there, and this was allowed upon a *Habeas Corpus*, in *B. R.*, so long as the judgment there remained in force; wherefore, if the petitioner can, either by the laws of *Savoy* or of *Rome*, repeal that sentence at *Turin*, let him do so; but, till

(*a*) *Gold* v. *Canham*, 1 *Ca. in Cha.* 311.

(*b*) "1 *Roll.* 530. *B.*" *Wier's* case, cited as *Wibred* and *Wyer's* case, 2 *Keb.* 511. 610.

that

that be done, it is not possible for the Arches or the delegates to give any other sentence than what they have given.

But I hope the merits of the cause shall never be debated here, for the main question at this time is, whether your Lordships have any jurisdiction in this case, or can take any cognisance of this matter? And this point makes it no longer to be Mr. *Cottington*'s case, but the King's, whose sovereign power in all ecclesiastical causes is deeply concerned, and his ecclesiastical supremacy invaded, if this petition be received; for the petitioner ought to have applied himself to his Majesty for a commission of review, if there be cause for it, and not to this House, it being against law, and without all precedent, so to do. Whereupon the House referred it to the Committee of Privileges, and the King commanded me to attend the committee. At this committee the Lords, who were zealous to assert the jurisdiction of the House, caused divers precedents to be read, viz. *Tempore, E.* 1. *Riley*, 135, 136. *Rot. Pl.* 8. *E.* 2. No. 43. 5 *E.* 2. No. *Petico Abbatis Rufford*, 8 *E.* 2. No. *provicario Ecclesiæ. sancti Buttolph. extra Aldersgate*, 4. *E.* 2. No. 42. p. *John Bland*. *Prynne*'s plea for the Lords, 418., who cites *Rot. Claus*, 8 *E.* 2. for a Legacy, 9 *H.* 5. *Rot. Plm.* No. 12., a prohibition for tithes, 2 *H.* 4. *Rot. Pl.* No. 29., where the *Brachium Seculare* did assist the ecclesiastical; and 22d *December*, 1640, Sir *Robert Howard*'s case, where the Lords adjudged the Archbishop of *Canterbury* to pay 500*l.* to Sir *Robert Howard*; and Sir *Francis Moor*'s Reports, 462. *Halliwell* and *Jervis*'s case, 2 *Leon*, 126, 127. *Frankwell*'s case, 4 *Inst.* 341. *Hollingworth*'s case, touching the appeal by way of review; and 2 *Roll.* 233. *Pl.* 3. 4 *Inst.* 340., touching appeals by bill signed. None of all which did any way come near the point in question.

As little to the purpose were these points of law which the counsel of Mr. *Cottington* insisted upon, only to show learning; as, 1st, That all judgments given in Parliament are, in law, given by the King and Lords; for which they cited 1 *H.* 4. *Rot. Parl.* No. 74.; and the Lords' Journal, 10th *December*, 1621.: 2d, For the generality of the Lords' jurisdiction they cited *Selden de Synedriis*, b. 3. p. 8.; 3d, That, originally, the Ecclesiastical Court, and the Civil Court, sat together, but by the Conqueror they were divided,

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vided, by the advice and consent of the Bishops and Lords, *Selden's Analecta*, 129, 130., *Seld. Eadmer*, 167, 168., *Leges. H.* 1. cap. 79.; 4th, For the ground of the appeals to the King they cited *Assise de Clarendon*, 10 *H.* 1. c. 8.; 5th, That the Statute of 25 *H.* 8. had not taken away the King's power, *Hob.* 146. *Colt* and *Glover's* case; 6th, That the King had consulted with the Lords in matters spiritual, for which they cited *Bundell Bren. Turn.* 17 *E.* 1.; 7th, That the King had prohibited appeals to the Pope by advice of the Lords, viz. in *Rol. Claus.* 8 *H.* 3. *M.* 34. *Dorso*, 1 *E.* 3. *M.* 9. *Dorso*, 14 *E.* 3, *Pt.* 1. *M.* 41. *Dorso*; none of all which considerations did any way touch the point in question. At last my Lord Privy Seal cited a precedent, 30th *May*, 1628, *Vaughan's* case, where the Earl of *Clare* reported from the committee of petitioners, that *Vaughan* claimed by a will, against which a sentence had been given and affirmed by the delegates, and prayed relief. The Lords, upon debate, directed the petitioner to apply himself to the King for a commission of review, and *Coventry Custos* promised to promote it. This being a precedent so full in the point, and yet so contrary to the inclinations of the Lord who cited it, gave great satisfaction. Then I opened the reasons of law upon which this point depended, and said they ought to prevail, though there had been precedents against it, as there are none in 500 years, and the latter precedent is for it. The reasons were, 1st, Because the statute of 25 *H.* 8. makes the sentence upon appeals final and definitive, and, though these words do not exclude the King's prerogative to grant a commission of review, for the *dernier* resort to the prince is not to be barred by general words, yet those words have this effect, that a commission of review is now purely matter of grace, and no man can demand it *ex debito justiciæ* (a); for constant experience shows that is often denied. 2d, From hence it follows, that the Lords have nothing to do to review these sentences, for the Lords sit here only to dispense right, not to dispense matters of grace, which the King reserves to himself. 3d, And it is no

Commission of review, matter of grace.

(a) See *Franklin's* case, 2 *P. W.* 299., and the certificate of the Lord Chancellor in *Eagleton* v. *Kingston*, 8 *Ves.* 438.

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no kind of answer to say, the King is here virtually present, for that does not entitle us to dispense acts of grace for him, and we may as well pretend to grant pardons, or assume any other part of the government by virtue of this very dangerous distinction, as the late times showed us. 4, The inconvenience were intollerable; for then we might as well review every probate of a will, and then no man could tell how to administer, for appeals below ought to be brought in fifteen days, but there is no time limited for appeals to Parliament, so the acts of an administrator are never safe, but will always be subject to a repeal here, which will make them null and void. 5, It would be yet more inconvenient in causes matrimonial, which, as they are more spiritual, so they have a more temporal consequence, and may tend to the bastardising of children. With these reasons the committee was satisfied, but, when it came to be reported to the House, the Earl of *Essex* gave greater satisfaction, and wisely put it, not upon any original defect of power in the Lords, which was an unpleasing subject to speak of, but upon the Lords' voluntary departure with that power; for so he pressed the words of the statute, 25 *H.* 8. "Final and definitive," that now the Lords were excluded by their own consent, though they were not specially named; and compared it to the statute of 27 *Eliz. c.* 8, of errors, where the Lords, passing an act to make errors in *B. R.* reversible in the Exchequer Chamber, added a clause to reserve to themselves a power of examining the judgments given in the Exchequer Chamber, without which the Lords had been excluded; and, in 31 *Eliz. c.* 1., did further provide, that, for errors in *B. R.*, the subject might have election to sue in Parliament, without going to the Exchequer Chamber; for, till then, the Lords had excluded themselves of that privilege. And now, lately, in 19 *Car.* 2, the act for rebuilding of *London* erects a judicature to determine controversies speedily and finally; so does the following act, *Car.* 2, for rebuilding of *Southwark;* and no appeal can be to the Lords from any of these decrees, because the Lords are understood to have excluded themselves without being specially named; and, otherwise, *London* and *Southwark* could not have been rebuilt. Upon these reasons, the House agreed with the committee;

and

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and now it is settled, that no appeals from the delegates can come before the Lords; and, in consequence of this resolution, the Lords, within a few days after, rejected the petitions of *Bamfield* and *Rogers*, and of *Cole* and *Mordant*, wherein relief was prayed against the probate of a will affirmed by the delegates. (*a*)

(*a*) *Saul* v. *Wilson*, 2 *Vern.* 118.

SMITH *v.* FROMONT.

July 18.

Two persons having agreed to work a coach from *Bristol* to *London*, one providing horses for a part of the road, and the other for the remainder, and in consequence of the horses of one having been taken in execution, the other having provided horses for that part which had been undertaken by the first, and claiming the whole profits of the journey; the court refused an injunction against continuing to provide horses.

THE bill stated, that the Defendant being the owner of two coaches travelling from *London* to *Bristol*, in 1814, sold to the Plaintiff the working of the coaches on a part of the road, namely, from *London* to *Hare Hatch*, the Plaintiff providing the horses to be employed, and paying to the Defendant a certain sum per mile, for the use of his coaches, and the clear profits of the whole journey between *London* and *Bristol* being divided in proportions specified; that the working of the coaches under the agreement was continued till 1817, when, in consequence of a temporary inability of the Plaintiff to provide horses on a part of the road between *London* and *Hare Hatch*, it was agreed that the Defendant should provide horses on that part, and receive a proportionate additional share of profits, until the Plaintiff should again be able to provide horses of his own; that the coaches were so worked till the 7th and 8th of *June* 1818, when, though horses provided by the Plaintiff were ready at the usual times and places, some persons, by the order of the Defendant, put to the coaches horses belonging to him, and prevented the Plaintiff working the coaches with his own horses; and that the Defendant had since

 refused

refused to permit the Plaintiff's horses to be used on any part of the road, or to allow to the Plaintiff his share of the profits, and had sent a written notice to the Plaintiff, that he should be no farther concerned with him in the coach business.

The bill prayed an account of the profits of the coaches worked by the Defendant in contravention of his agreement, and an injunction to restrain the Defendant from so working the coaches.

The allegations in the bill being supported by affidavit, the Plaintiff on this day moved for an injunction.

The affidavit in opposition to the motion stated, that the inability of the Plaintiff to provide horses, was the consequence of his horses having been taken in execution, under an extent for 3123*l.*, and a writ of *fieri facias* for 4900*l.*; that by such executions, of which the Defendant had no previous notice, the coaches were suddenly stopped, and the Defendant was subjected to great inconvenience and expense in procuring other horses to forward them; that some of the horses seised were sold, and advertisements were published for the sale of the rest; and the Defendant having been informed and believing that the other horses of the Plaintiff were about to be sold, purchased fresh horses for working the coaches the whole way; and that he believed that all the Plaintiff's horses were then in the custody of the Sheriff.

Mr. *Hart* and Mr. *Raithby*, for the motion.

Mr. *Wetherel* and Mr. *Mascal*, against the motion.

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The LORD CHANCELLOR.

The only instance that I recollect of an application to this Court to restrain the driving of coaches, occurred in the case of a person who having sold the business of a coach-proprietor from *Reading* to *London*, and undertaking to drive no coach on that road, afterwards established one. With some doubt whether I was not degrading the dignity of this Court by interfering, I saw my way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other. (*a*) This is quite a different case: the Defendant having received 700*l.* as the consideration for giving up a part of the road which lay in the way from *London* to *Bristol*, the profits being divisible in the ratio of the distance which each party undertook to provide; the Plaintiff fell into embarrassments, which produced the seizure of his horses, and an advertisement for the sale of them by the Sheriff. While the Plaintiff is in this situation, the Defendant is bound by his agreement to undertake with persons at *Bristol* to bring them to *London*, and when they arrive at *Hare Hatch*, he is stopped by the Plaintiff's want of horses, and would be liable to an action by every individual within and without his coach, if it were not forwarded. But it is difficult to understand how such a case can be the proper subject of the jurisdiction of this Court by injunction. If I enjoin the Defendant from bringing horses to convey the coaches between the limits in question, I must enjoin the Plaintiff from *not* bringing horses there. I cannot restrain the Defendant, unless I have the means of assuring him that he shall find the Plaintiff's horses ready. I should otherwise enjoin him from doing that which if he omits

(*a*) *Williams* v. *Williams, ante*, p. 255.

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to do he will be liable to actions by every person whom he has undertaken to convey from *Bristol* to *London*; and should issue the injunction on the supposition that the Plaintiff would do that which he has not done, and which it seems he is not at present in a condition to do. The omission of this Court to interfere certainly leaves the parties in a very unpleasant situation, and their interest will be best consulted by a compromise. A question may arise, whether the Plaintiff, shewing that his horses were always ready, will not be entitled to the same profits as if they had been used? But in a case of this sort I cannot grant an injunction.

Injunction refused.

ROLLS.

Oct. 23.

WYNSTANLEY *v.* LEE.

Injunction to restrain obstruction of ancient lights refused, the nature of the alleged injury not requiring preventive interposition before a trial at law, and the legal right being doubtful.

The presumption of a right, from twenty years undisturbed enjoyment of light, is excluded by the custom of *London*.

THE bill stated, that the Plaintiffs were possessed of a house near the Exchange, in the city of *London*, separated, on the west side, by a court or passage, formerly called *Bartholomew* Court, of the width of eight feet, from a plot of land, being the scite of an ancient building in the possession of the Defendants; and that the Plaintiff's house, as to so much thereof as abuts upon the said court, and is separated thereby from the premises of the Defendants, was, about ten years ago, built upon part of the scite of two ancient dwelling-houses, which were taken down for that purpose, and in which there had been, from the time of the erection thereof after the great fire of *London*, divers windows looking into the court, and receiving light therefrom, and over the roof of the ancient building on the premises of the Defendants, which windows, and the light thereof, the

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occupiers of the dwelling-houses were entitled to enjoy free from obstructions; that, upon the erection of the house on part of the scite of the two ancient dwelling-houses, several windows were made looking into the court, and receiving light therefrom, and over the roof of the building on the premises of the Defendants, in the same manner as the ancient dwelling-houses, and that any erection on the premises of the Defendants, which would obstruct the light of the windows in the Plaintiffs' building, would equally have obstructed the light of the ancient dwelling-houses on part of the scite whereof the said building hath been erected; and that on the plot of ground in the possession of the Defendants, and divided from the premises of the Plaintiffs by the court, there was an ancient building, used as a wash-house, being only of the height of nine feet from the level of the court, which the Defendants had lately taken down, for the purpose of erecting a much larger and higher building upon the scite thereof, whereby, in case the intention of erecting the same should be carried into effect, the light of the windows in the Plaintiff's house would be wrongfully obstructed, and the house would be greatly injured and deteriorated in value, and the light of the windows of the ancient dwelling-houses on part of the scite whereof the Plaintiff's house hath been erected, in case the same had been still standing, would have been, in like manner, obstructed.

The bill, farther stating, that the Defendants were proceeding to the erection of the new building, and had given directions to their workmen for the immediate erection thereof, designing to build the same of much greater height and dimensions than their former building, so as to obstruct the light of the windows of the Plaintiffs' house, prayed, that the Defendants might be restrained and injoined, by the decree of the Court, from

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erecting or constructing any building whatsoever upon the plot of land in their possession, whereby the light of the windows in the Plaintiffs' house, as the same were enjoyed previous to the taking down the ancient building upon the same plot of land, might be in any wise obstructed or prejudiced.

On the filing of the bill the Plaintiffs presented a petition for an injunction. The affidavit in support of the petition stated, in addition to the substance of the bill, that one of the Defendants had admitted to the deponent, his intention of erecting a building on the scite of the premises lately taken down, of much greater height and dimensions, and showed to deponent plans of the intended building, by which it appeared, that it would be erected so much higher, and of such larger dimensions, as nearly to darken the lights of the Plaintiffs' house; and that the Defendants had already laid the foundation of the intended building. The substance of the affidavits in answer is stated in the judgment.

Mr. *W. D. Evans* was heard in support of the petition, and Mr. *James Stephen* against it, in the absence of the editor.

The MASTER *of the* ROLLS.

The first question is, whether, supposing the Plaintiffs to have established their legal right to remove the building begun by the Defendant, they have entitled themselves to the preventive interposition of this Court? The injury of postponing a building which the party is entitled to erect, may not, in every instance, be equal to the injury of permitting him to proceed with one which is a nuisance. Cases arise in which a court of equity, seeing that the injury might be irreparable, as where loss of

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health, loss of trade, destruction of the means of existence, might ensue from erecting a building, would exercise its jurisdiction of preventing injury, without waiting the slow process of establishing the legal right, when delay would be itself a wrong. On the other hand, it may be perfectly clear, that the Plaintiff is entitled to succeed in an action of trespass, and yet a court of equity will not interpose by injunction; the nature or degree of injury not being such as to require that extraordinary relief, as in *The Attorney-General* v. *Nicholl.* (a) Upon this distinction, there clearly explained, between the principles on which a court of equity interposes by injunction, and those which govern courts of law in deciding on the legal right, after the injurious act is done, the Lord Chancellor, in that case, following the doctrine of Lord *Hardwicke* (b), dissolved the injunction, imposing on the Defendant, in the event of the Plaintiff succeeding at law, a condition which, in that event, he certainly could not have resisted. On these principles this application must depend; the Plaintiff is bound to show, not only a legal right to the enjoyment of the ancient lights, but that, if the building of the Defendant is suffered to proceed, such an injury will ensue as warrants the Court to interpose, and at once take possession of the subject by injunction.

It must not be forgotten, that the temporary suffering from delay, which has been principally urged for the interposition of the Court to prevent the intended building till the right has been decided at law, is not wholly on one side. The affidavit of the Defendants states, that by the injunction, if granted, they will lose the opportunity of covering in their building before the winter, and be deprived of the profit to result from it, estimated

(a) 16 *Ves.* 338. (b) 1 *Dick.* 164, 165.

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at 100*l.* *per annum*. And this important difference presents itself, that any loss which shall ensue to the Plaintiffs, may be compensated in damages, provided they ultimately succeed at law; whereas, in a contrary event, the loss of the Defendants must remain without redress, being the consequence of the act of the Court.

If the Court is in general governed by the principles which I have stated, certainly the reason is stronger on an application in this stage of the proceedings, on certificate of bill filed before answer; a stage in which the Court never interposes, unless the injury is of a nature so pressing as not to admit delay. It is departing from all principle to adjudicate rights when the pleadings are not before the Court, and the Defendants have not had an opportunity to state their claim by their answer. The Plaintiffs acted properly in giving notice to the Defendants, to enable them to meet the application by affidavit; without which the Court would have postponed the discussion, and would not have been satisfied with *ex parte* evidence.

On the affidavits, the general outline of the Plaintiffs' case is not disputed; that is, the vicinity of the houses, with an interval not exceeding nine or ten feet, the antiquity of the scite of the present house, subsisting in the place of an ancient building, and enjoying the same privilege of light. But the Defendants deny that the building which they have removed was, as it is described, a mere washhouse; they allege, that they are proceeding to build on the scite of ancient dwelling-houses, and controvert the evil which will result from the building if it proceeds, denying, in contradiction to the affidavits which support the petition, that the Plaintiffs' house will be materially injured. The averment that the Plaintiffs' windows will be wrongfully obstructed, is true, if any portion

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portion of the light is wrongfully intercepted; but the Plaintiffs state, that their house will be greatly injured and depreciated. That was the allegation in the *Attorney-General* v. *Nichol*, which described a wrongful obstruction already done, (in that respect stronger than this case,) such "as materially to affect the value of the premises (*a*);" here it is only said, that the premises will be greatly injured and deteriorated; there they were already injured, and that injury was to be aggravated. The effect on the value of the premises in that case, was held by the Lord Chancellor not a sufficient ground for interposing; here the fact is denied even to the extent alleged. The Defendants represent, that any diminution of light will not be attributable altogether to their building, the Plaintiffs having already surrounded their house with buildings erected on an open part of the court, and thereby obstructed the access of light, by which an additional structure is rendered injurious, as it would not have been without such previous buildings. In this way only can the effect of these buildings be fairly stated; that the Plaintiffs have thereby in part produced the injury of which they complain, and rendered a small addition possibly inconvenient.

The Plaintiffs have not stated precisely the injury to be experienced from the building of the Defendants. Some windows, I must suppose, will be obscured, but will the effect be prejudicial to the comfort of those residing in the house? It is said, that the building will be injurious to the house, but not that in the interval before the trial the comfort of those dwelling there will be affected. Then taking it for the moment to be true, though denied, that some injury will result, and not inquiring how far it arises from the Plaintiffs' own act,

(*a*) 16 *Ves.* 339.

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but considering only the *quantum* of injury, the question is, whether a case is made for the interposition of the Court, to stay proceedings before answer, by this *festinum remedium?* I think the Plaintiffs have not so stated the injury to arise from the building, as to entitle themselves to an injunction.

But a material objection has been raised on the question of legal right. The houses are in the city of *London*, and on a former occasion, a custom of the city was certified by the recorder, "that if any one hath a messuage or house in the said city, near or contiguous and adjoining to another ancient messuage or house, or to the ancient foundation of another ancient messuage or house in the said city, of another person his neighbour there; and the windows or lights of such messuage or house are looking fronting or situate towards, upon or over against, the said other ancient messuage or house, or ancient foundation of such other ancient messuage or house, of such other person his neighbour, so being near, adjacent, contiguous, or adjoining, although such messuage or house, and the lights and windows thereof, be, or were, ancient; yet such other messuage or house, or ancient foundations, so being near, adjacent, or adjoining, by and according to the custom of the said city, in the same city, for all the time aforesaid used and approved, well and lawfully may, might, and hath used, at his will and pleasure, his said other messuage or house so being near, adjacent, or adjoining, by building to exalt or erect, or, of new, upon the ancient foundation of each other messuage or house so being near, adjacent, or adjoining, to build and erect a new messuage or house, to such height as the said owner shall please, against and opposite to the said lights and windows, near or contiguous to such other messuage or house, and, by means thereof, to obscure and darken such

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windows or lights, unless there be, or hath been, some writing, instrument, or record of an agreement, or restriction to the contrary thereof, in that behalf." (*a*) Supposing this custom to be applicable to the premises in question, there not only is no case made for equitable relief, but the Plaintiffs could not ultimately succeed in a court of law on the legal right.

It is then contended by the Plaintiffs, that, notwithstanding this custom, which, having been certified in 1757, must be considered as still subsisting, there is ground to presume a grant of a right to the enjoyment of the ancient lights on the Plaintiffs' premises. (*b*) It is rightly said, that the presumption of a grant would supersede the custom; *quilibet potest renunciare juri pro se introducto;* and it is argued, that possession during twenty years is equivalent to, and affords presumption of, a grant. I cannot accede to that argument. To admit it would be to abolish the custom, which could no longer be applicable to any case. The city would then be subject to the same rule as every other part of the kingdom. Before the expiration of twenty years, neither in the city, nor elsewhere, could any right arise to prevent such obstruction of light; and if, after twenty years, the citizens of *London* were as much restrained as the inhabitants of every other part of the kingdom, what becomes of the custom?

The technical answer to the argument is, that the Courts presume a grant in ordinary cases, because they presume, that the party would not have abstained, from

(*a*) *Plummer* v. *Bentham*, 1 *Burr.* 250, 251., see on this custom *Calthrop*, 1. *Hughes* v. *Keene*, *Godb.* 183. *Yelv.* 215. 1 *Bulstr.* 115. *Anon. Com.* 273.

(*b*) See *Lewis* v. *Price*, 2 *Saund. Ed. Williams*, 175. *a. Dougal* v. *Wilson*, *Ibid. Daniel* v. *North*, 11 *East*, 372.

excr-

exercising his right of interference, knowing, that twenty years abstinence would extinguish it, unless he intended to permit the enjoyment; and, after the other party has been encouraged to rely on acquiescence, there is, on both sides, a strong ground to make possession the basis of right. Enjoyment during twenty years confers a property in light, under the technical form of presumption of a grant; but would that be a fair presumption in the city of *London?* No man occupying a house there, can suppose that he has an absolute property in his present share of enjoyment of the light, whatever that may be, but knows, that, by the law of the city, the owner of the adjoining house, or scite of houses, may build to any height, and to the obstruction of his light, and knows, therefore, that he can never be entitled to enjoy his light free from obstruction by the owner of the adjoining house, unless there is some writing between them. His title must be founded, not on parol, or enjoyment, but on writing; that is the law under which the owners of houses claim; they bought subject to that custom: each party, therefore, knows, that, without a writing, by the custom, his neighbour may build to the obstruction of his light; and, on the other hand, that he is safe in acquiescence, because, unless he has given a writing, his privilege remains. There is no ground therefore for presumption, from the acquiescence of one party, or the enjoyment of the other, without a written title. It would be too much to hold, that this custom may be altogether repealed, merely by the length of time during which one party has enjoyed, and the other acquiesced, supposing them citizens of *London*, residing there, and subject to its privileges and customs.

On both grounds, therefore, I think, that no case is made for the interposition of the Court. Supposing the right clear, no circumstances are stated requiring this extra-

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extraordinary interposition; but the right is not sufficiently clear, to enable the Court to interpose with safety. The Plaintiffs may try the right at law; the Defendants now have notice of the objection to the building, and proceed at their peril. (*a*)

Injunction refused.

(*a*) See *Cherrington* v. *Abney*, 2 *Vern*. 646. *Bateman* v. *Johnson*, *Fitzg*. 106. *Fishmonger's Company* v. *East India Company*, 1 *Dick*. 163. *Attorney-General* v. *Bentham*, 1 *Dick*. 277. *Ryder* v. *Bentham*, 1 *Ves*. 543. *Norris* v. *Lord Berkeley*, 2 *Ves*. 452. *Attorney-General* v. *Doughty*, 2 *Ves*. 453. *Attorney-General* v. *Nichol*, 3 *Mer*. 687. 16 *Ves*. 338.

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Dec. 1.

BIRD *v*. HUNSDON.

A testator, having brothers and sisters, and several nephews and nieces, and having given a legacy to one of his brothers, directed his residuary estate to be invested in government security, the interest to be paid for the maintenance of *M*. as long as she lived single and without a child; and at her death the money to come to his brother's and sister's children; *M*., although married and having a child, is entitled to the interest for life, not to the principal.

THE will of *John Hunsdon*, dated the 10th of *September*, 1800, after appointing his brother, *Peter Hunsdon*, and *Samuel Seabrook*, executors, and bequeathing to the former 50*l*., and to the latter 30*l*., and directing the payment of his debts, and the application of a sum for the maintenance of his father, and giving 30*l*. to *J. Briggs*, and 10*l*. to *J. Bird*, contained the following clause: "I also leave *Mary Brand*, wife of *Robert Brand* of *Hornchurch*, the sum of 10*l*., and daughter of my brother, *Edward Hunsdon* and *Mary Brand*, equal share with all the rest. I also desire to leave *Mary Morris*, daughter of widow *Mary Morris* of *Bentry Heath*, the sum of 10*l*., late wife of *John Morris*, and *Samuel Seabrook* to be her guardian, and put it out. And when my funeral, and all my just debts and legacies are paid, that the rest of money to be put into govern-

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ment security, and the interest to be paid duly to bring up and educate *Mary Morris*, daughter of widow *Mary Morris*, and *Samuel Seabrook*, her uncle, to be her guardian; and the said *Mary Morris* to have the said interest to maintain her as long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children. All share alike, and their uncle *Peter* to be their guardian."

In *February* 1801, the testator died, leaving several brothers and sisters, and also several nephews and nieces, their children, of whom *Mary Brand*, the legatee, was one. *Mary Morris*, the daughter, (having previously attained the age of twenty-one), on the 6th of *October*, 1816, married *John Bird*.

The original bill filed by *Bird* and his wife against the surviving executor, the next of kin, and nephews and nieces of the testator, prayed a declaration, that under the will of the testator, in the events which had happened, the Plaintiffs were entitled to the clear residue of the personal estate of the testator. The answer submitted, that the interest of the money in question was given to *Mary Morris*, so long only as she should live single; and that all her right and interest ceased on

In consequence of the birth of a son, the Plaintiffs filed a supplemental bill, alleging, that by that event their right to the clear residue was established. The Defendants contended, that the event was immaterial, and claimed the same benefit as if they had demurred to the supplemental bill.

Mr.

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Mr. *Horne* and Mr. *Shadwell* for the Plaintiffs.

Mary Morris is clearly entitled to the interest of the fund during her life; the bequest to the testator's nephews and nieces cannot in any event take effect till her death. The most probable intention to be collected from this obscure will is, that she, the principal object of the testator's bounty, should receive the interest while she remained single, and become entitled to the principal on marriage and the birth of a child.

Mr. *Hart* and Mr. *Treslove* for the Defendants.

The bequest in favour of *Mary Morris* is confined to the interest of the fund, and to the period during which she lives single and without a child. The intention of the testator might be reasonably limited to that period; when she ceased to be single, being maintained by her husband, she would no longer need his bounty, and if she became a mother without marriage, she would no longer deserve it.

The MASTER *of the* ROLLS.

The first question on the construction of this will is, what is given to *Mary Morris?* The second, for what period?

On the first question, I am clearly of opinion, that nothing is given, or designed to be given, to *Mary Morris*, but interest. The testator having brothers and sisters in existence, made his will, evidently not intending any gift to the next of kin, as such, but intending a gift to his brother's and sister's children, who are not his next of kin. After disposing of several pecuniary legacies, he directed his executors to invest the residue of his personal property in government security, not stating in whose name the investment was to be made,

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not specifying the name of the legatee; and, therefore, as it must be taken, intending the name of the executors. He then considers what is to become of the interest and dividends. To *Mary Morris* he means to appropriate the interest, and the interest only, of the residue so laid out. He directs the interest to be paid to her; and when it shall please God to call her, the *money* to come to his brothers' and sisters' children. The interest is given to her; and on her death, the money, that is, the capital, is to be divided among persons described; one of whom, he had previously declared, should have an equal share with all the rest; a declaration evidently supposing a period at which a division was to take place among them. The gift to *Mary Morris* contains no words entitling her to more than interest. On the first question, therefore, the Court observes in the will, the absence of words giving the capital to *Mary Morris*, and a positive declaration implying a gift of the capital to the nephews and nieces of the testator.

On the second question, for what period the interest was given to *Mary Morris*, it appears that the testator contemplated three periods: 1st, her minority; 2d, her remaining single, without a child; 3d, the interval between her marriage and death; and, I think, that without violence to the words, the Court may infer, that he meant to give the interest to her for her life. First, he gives it for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single, and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying, either that there is intestacy during the remainder of her life, or that she is to take during

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her whole life. The latter seems the more reasonable alternative. I cannot suppose that the testator meant to leave a partial interest in the property undisposed of; and that, on the marriage of *Mary Morris*, the dividends, during her life, should devolve on those for whom the will expresses no intention to bequeath more than a legacy of 50*l*. to one.

The ulterior bequest cannot assist the Plaintiffs; for that is not to the next of kin, but to nephews and nieces; and they are unquestionably to wait till the death of *Mary Morris*. The only division which the testator contemplated, was one in which *Mary Brand* was to share as niece, and not one of the next of kin. The capital is expressly given to brothers' and sisters' children. The supposition, therefore, that the testator meant to die intestate, for the benefit of his brothers and sisters, is unwarranted.

I am of opinion, therefore, that, though there are no express words contemplating this third period, after marriage, and before death; yet, when the testator, foreseeing that interest must be payable to some one, because the money was invested in government security, producing interest, bequeaths that fund on the death of *Mary Morris*, it is not a violence to say, that he gives the interest to her during her life.

"His Honor doth declare, that, according to the true construction of the testator's will, the Plaintiffs are, in right of the Plaintiff *Mary*, entitled, during the life of the said Plaintiff *Mary*, to the interest of the clear residue of the testator's personal estate," &c.

Reg. Lib. A. 1818. fol. 734.

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Estates being sold by auction in lots under conditions, one of which expressed that they were subject to the perpetual payment of 120*l.* a-year to the curate of *N.*, but that the same, and the perpetual annual payment of 20*l.* to the hospital of *C.*, were in future to be charged upon, and paid by, the purchaser of lot 1. only; the purchasers of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require.

IN pursuance of a decree in this cause, certain estates were sold by auction, on the 24th and 25th of *October*, 1811, in forty-seven lots. The eighth condition of sale was expressed in these words: "The estates comprised in the foregoing particular, are subject to the perpetual payment of 120*l.* a-year, to the curate or chaplain of *Northaw;* but the same, and the perpetual annual payment of 20*l.* to the hospital of *Cheynes*, in *Buckinghamshire*, are in future to be charged upon, and paid by, the purchaser of lot 1. only." Lot 1. was purchased by *Patrick Thomson;* and five other lots, by *J. H. P. Schneider.* On the 11th of *November*, 1815, a reference was directed to the Master, to inquire whether a good title could be made to the lots purchased by *Schneider;* and on the 26th of *July*, 1816, by an order to which *Schneider* was no party, a further reference was directed to the Master, to approve a deed of indemnity from *Thomson* to the purchasers of the other lots, against the annual payments of 120*l.* and 20*l.* On the 7th of *May*, 1817, the Master (having on the 3d of *March* certified his approbation of a deed of indemnity) reported, that a good title could be made to the lots purchased by *Schneider.* To this report *Schneider* excepted, insisting that the Master ought to have certified that a good title could not be made.

The deed of indemnity approved by the master (an indenture between *Thomson* of the first part; *Casamajor* and *Fowler*, trustees for sale of the estates, of the second part; all the purchasers at the sale, except *Thomson*, of the third part; and *P. A. Hanrott* and *J. Jones* of the fourth part), after reciting the title of the vendors, the particu-

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lars of the annual payments, amounting to 20*l.* and 120*l.*, the decree and sale, the conveyance of lot 1. to *Thomson*, and the subsequent proceedings, witnessed, that *Thomson*, at the request of the trustees for sale, charged all the premises comprised in lot 1., with the payment of the annual sums, amounting to 20*l.* and 120*l.*, in exoneration of all other tenements, &c. liable to the payment; and for better effectuating such charge, *Thomson* conveyed to *Hanrott* and *Jones*, their heirs and assigns, for ever, a clear annuity, or yearly rent-charge of 140*l.*, issuing out of the premises comprised in lot 1., payable quarterly; the first payment to be made on the 25th of *March* then next, with a power of distress, on non-payment for twenty days after any quarterly day of payment, and a power of entry and perception of rents, on non-payment during thirty days. The deed contained a declaration, that the rent-charge of 140*l.* was granted upon trust, in case the several parties named in the schedule (the purchasers at the sale), or any of them, their, or any of their heirs or assigns, or any persons claiming under or in trust for them, or any other persons for the time being entitled to, or in possession of, the premises comprised in the several lots mentioned in the schedule, or any part thereof, should, at any time thereafter, be compelled to pay and satisfy the several annuities thereinbefore charged exclusively on the premises out of which the annuity of 140*l.* was thereby granted, or any of them, or any part thereof respectively, or any arrears thereof, or should incur or sustain any costs, charges, damages, or expenses, on account thereof, then, from time to time, as the same should happen, upon trust, that *Hanrott* and *Jones*, or the survivor, his heirs or assigns, should, from time to time, when lawfully required, by and out of the yearly rent-charge thereby granted, by raising and levying the same, or any part thereof, under the powers therein contained, or by such other means as to them should

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should seem meet (but not until such notice as thereafter mentioned should have been given), raise and levy all and every such sum and sums of money, losses, costs, damages, and expenses whatsoever, as the several parties named in the schedule, or any of them, or any or either of their heirs or assigns, or any persons claiming under or in trust for them, or any other persons for the time being entitled to, or in possession as aforesaid, should have been compelled to pay, or have sustained or incurred as aforesaid; and all costs and expenses which *Hanrott* and *Jones*, or the survivor of them, or the heirs or assigns of such survivor, should have incurred, in or about levying and satisfying such monies as aforesaid, or otherwise in or about the execution of the trusts of the deed, and pay and dispose of the monies so levied accordingly, so as well and effectually in all things to indemnify the parties of the third part, their heirs, executors, &c. and all persons claiming under them respectively, or otherwise as aforesaid, their respective lands and tenements, goods and chattels, against the said yearly payments of 20*l.*, &c. respectively, and all arrears and future payments thereof, and all contributions, claims, and demands whatsoeveron account thereof.

A further declaration followed, that no sums of money should be raised under the trusts, unless *Hanrott* and *Jones*, or the survivor of them, his heirs or, assigns, should have previously given to *Thomson*, his heirs, appointees, or assigns, one calendar month's notice, or more, of his or their intention to raise the same, and of the amount to be raised; such notice to be in writing, signed by *Hanrott* and *Jones*, or the survivor of them, his heirs or assigns, and delivered to *Thomson*, his heirs, &c., or left at his or their usual or last place or places of abode; and that *Hanrott* and *Jones*, and the survivor, &c., should permit the persons for the time being

 beneficially

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beneficially entitled to the premises thereby charged, with the rent-charge, to retain the rent-charge until the trusts before declared should arise or require to be performed, and also to retain and receive the surplus of the rent-charge, which should remain, and not be applied in or towards the execution of the trusts before declared. The deed also included a separate covenant by *Thomson* with each of the parties named in the schedule, their heirs, executors, &c., and with every such other person for the time being entitled, or in possession as aforesaid, that *Thomson*, his heirs, appointees, or assigns, should, from time to time, pay and satisfy the several annuities of 20*l.*, &c., when they should become due, and effectually indemnify the several parties named in the schedule, their heirs, executors, &c., and all persons claiming under, or in trust for them, and all persons for the time being entitled, or in possession, as beforementioned, and their respective estates and chattels, and especially the lands purchased by them at the said sale, against all the annuities, and all arrears and future payments thereof, and against all actions, suits, claims, loss, charges, and expenses, &c., by reason of non-payment of the annuities, or any part thereof, by *Thomson*, his heirs, appointees, or assigns, or any distress or other proceedings, claim, or demand, on account of the same.

Other clauses authorised the trustees to retain their expenses out of the trust-money, and empowered a surviving trustee to appoint new trustees.

Mr. *Wetherell*, and Mr. *Shadwell*, for the exception. (*a*)

The stipulation, that the annuities "are in future to

(*a*) The argument and judgment on the first application, *ex relatione*.

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be charged upon, and paid by, the purchaser of lot 1. only," entitles the purchasers of the other lots to an absolute exemption from the charge. They claim, not indemnity, but exoneration. For this purpose, the vendors are bound, if no other means of exoneration exist, to obtain a private act of parliament. An act might be obtained for extinguishing the annuities, in consideration of an equivalent, by analogy to acts authorising exchanges by ecclesiastical persons, before Lord *Egremont*'s act (*a*) dispensed with the occasional interposition of the legislature. The liability to a rent-charge is an objection to the title.

Admitting that the purchasers are not entitled to exoneration, the indemnity provided by this deed is inadequate. An annuity of amount only equal to the original annuities, and payable to trustees, affords no provision for the expenses to which the purchasers may be subjected, by the neglect of the trustees to pay the sums as they become due: nor are the means for securing payment of the annuity adequate; a power of entry, and distress, and perception of rents; a term should have been created. The annuity being limited to the heirs of the trustees may vest in an infant. A covenant is not a sufficient security. The indemnity to the purchasers is limited to the case of payment by compulsion; and the covenant for raising the costs is personal only, and will not run with the land. *Brewster* v. *Kitchell*. (*b*)

Mr. *Benyon*, Mr. *Bell*, and Mr. *Hodgson*, for the report.

The conditions of sale require the vendors only to

(*a*) 55 *Geo.* 3. c. 147.

(*b*) 1 *Salk.* 198. 5 *Mod.* 368. *Comb.* 466. *Ca. Temp. Holt*, 175. 1 *Lord Raym.* 322. 12 *Mod.* 170. The majority of the judges in this case seem to have held that the land would be charged.

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charge the annuities on lot 1. not to exonerate the remainder of the estates. The particulars give express notice to the purchasers, that the annual sums are to re-remain as subsisting charges. As rent charges, if the persons entitled to them released a part of the lands, the whose would be extinguished; and they are payable to ecclesiastical persons, who are not capable of executing a valid release, and for extinguishing whose claims no act of parliament could, consistently with the orders of both Houses, be passed. There is no person competent to consent to such an act.

The purchasers of the other lots, therefore, can claim only an indemnity from the purchaser of lot 1.; such an indemnity as he can give without rendering his interest not marketable. His covenant operates as a grant, and charges the land, in equity at least; and the benefit of it, regarding something issuing out of the lands sold to the other purchasers, runs with their estate. *Spencer*'s case. (*a*) The amount of the indemnifying rent-charge is sufficient lot 1., the largest lot, being subject to contribute its proportion of the original rent-charges, the indemnity must always exceed the amount of the damage. It is the duty of the parties indemnified to keep the indemnity in constant operation; they have no title to be protected against the consequences of their own neglect. The creation of a term of years, an unusual provision in deeds of indemnity, would have rendered lot 1. unmarketable. If the rent-charge should become vested in the infant heir of a trustee (an inconvenience against which provision is made by the power for appointing new trustees), his guardian might distrain.

The case of *Hays* v. *Bailey* (*a*), is distinguishable from the

(*a*) 5 *Co.* 16.

(*b*) *Sugden, Law of Vendors*, 356., mentioned by the Master of the Rolls.

the present; the nature of the title there exposed the purchaser to litigation.

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My present opinion is, that the purchasers having bought with knowledge that all the estates were charged with inalienable annuities, are not entitled to require an exoneration by act of parliament. The fair import of the eighth condition of sale is, an indemnity *inter se*, not as against the owners of the rent-charge, who were no parties to the transaction. The proper exoneration is exoneration *inter se*, which was all that could be considered attainable. There is no agreement that a new estate shall be substituted to the curate and hospital, instead of the present annuities. The purchasers are informed, that there is a charge over the whole estate in favour of persons incapable of alienating it, and the express stipulation is, that the purchaser of lot 1. shall pay the whole. The nature of the arrangement is, that the charges are to remain as affecting the whole estate; but that the purchasers of all the other lots are to be indemnified by the purchaser of the first lot. This principle being settled, the rest is mere mechanism. The annuity, and all costs and expenses, not only of the trustees, but of any purchaser, in consequence of the neglect of *Thomson*, must be charged on lot 1. The indemnity must certainly include all costs. But the Court is not at present in a situation to pronounce an order; the question cannot be decided in the absence of *Thomson*. He must be brought before the Court.

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A petition having been accordingly presented by *Schneider*, praying that *Thomson* might be ordered to perform the eighth condition of sale, by causing the annual

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annual payments to be in future charged upon and paid by, the owners of lot 1. only, the cause was again mentioned.

Mr. *Wetherell* and Mr. *Shadwell*, for the exceptions.

The vendors ought to have obtained an act of parliament for exonerating the estates. The indemnity is insufficient; providing for payment of the annuities only, and not of costs; not securing a succession of competent trustees, and not creating a term of years.

Mr. *Benyon*, Mr. *Bell*, and Mr. *Hodgson*, for the report, relied on the opinion of the Court on the former argument; and insisted that the creation of a term, a chattel-interest, to secure a rent-charge in fee, would be contrary to principle.

Mr. *Preston* for *Thomson*.

The deed is prepared on the modern plan of creating an indemnifying rent-charge; the ancient course to create a power of distress, has been relinquished in deference to the objection, that a power of distress supposes a rent. The amount, equal to the annuities, becomes an effectual indemnity against costs, by the due payment of a part of the annuities; should a subsequent non-payment occur, the trustees would be authorised to levy the whole arrear of the indemnifying rent-charge; and the surplus, after payment of the annuities, would be applicable in discharge of costs. The creation of a term which would render the estate of the purchaser of lot 1. unsaleable, cannot be required.

March 2

The MASTER *of the* ROLLS.

Having already expressed an opinion, which I still retain,

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retain, that it was not the design of the eighth condition of sale to impose an obligation on the vendors to the extent contended for, it may be satisfactory to re-state the grounds of that opinion. The single question is, on the construction of that condition; whether it was intended to impose an obligation of exonerating the estates not comprised in lot 1. from the annual payments previously chargeable on them, or in a more limited sense, to protect the purchasers of those estates by an indemnity from the purchaser of the first lot. The words are not so explicit as to exclude doubt; but, if capable of two constructions, the larger construction of complete exoneration against the persons entitled to the annuities, or the more limited construction of exoneration to one class of purchasers by arrangement *inter se*, in determining which is the right construction, the Court must consider the subject-matter, and the parties. Does the stipulation refer to a discharge which could be made by the persons stipulating, or to a discharge in which the payees of the annuities must join? On the latter supposition, the vendors, trustees for the purpose of selling, voluntarily imposed on themselves an obligation which would have the effect of frustrating the whole sale. The persons entitled to the annuities were not competent to consent to a perpetual exoneration of the estates, on any terms, however beneficial; and the attempt to procure an act of Parliament, with no party able to consent, no fund to provide an equivalent, or to defray the expenses of the act, would have been exposed to insuperable impediments. In the choice of a construction, I cannot assume that the vendors gratuitously involved themselves in these difficulties. The terms of the condition suppose the continuance of a charge which, as far as concerns the parties entitled to it, affects the whole estate, but against which the purchaser of one part is to exonerate the purchasers of the rest.

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rest. Such an exoneration is certainly not complete. Some liability still remains; but the stipulation is expressly confined to an exoneration which might be effected by conveyances among the parties. Such seems the reasonable construction, and conformable to the practice in similar cases. When an estate is sold subject to a liability, as for the repairs of a chancel, the liability is frequently transferred to one lot; but no one ever heard of an act of Parliament for that purpose. That such an agreement amounts to an undertaking to procure an act of Parliament, is a proposition that requires strong authority, in opposition to frequent practice and the constant understanding of conveyancers.

Of the two constructions of which the words are susceptible, that which I have stated seems the most reasonable and must be considered as sanctioned by practice; and is such as will finally, in substance, and for all useful purposes, though not, perhaps, literally for all purposes, constitute an indemnity, and provide an ample fund for immediate repayment of whatever the parties may be called on to pay. The purchasers of all the lots but the first, are substantially exonerated, and the words of the contract are satisfied.

The remaining question, which the prayer of this petition particularly presents to the consideration of the Court, is, admitting that indemnity alone was intended, does the proposed deed accomplish that purpose? The purchasers have a right to be protected to the full extent to which protection can be given, by an arrangement imposing liability on one lot alone. *Schneider's* situation is extraordinary; he was no party to the reference in 1816 for settling the deed of indemnity, and has hitherto had no opportunity of suggesting any objection to its provisions. Considering that the deed was designed to secure his

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his estate from an annual payment of 140*l.*, to which it remains liable, it is certainly reasonable that he should have an opportunity of being heard upon it, before the Master. It has, however, been settled in his absence; and the present question is, whether it is free from objection. It is not the duty of the Court to settle the deed, and, for that purpose, to travel through every clause; but, if some inaccuracies appear, and means of rendering it more effectual occur, the petitioner is entitled to be heard before the Master.

Right of entry and distress without any estate in the lands on which the distress ss to be exercised.

Some of the objections which have been alleged are not of much weight; as, that a term of years should be created instead of a rent-charge in fee: the contrary would have afforded a stronger objection, namely, an indemnity limited to a number of years. It is clear that a right of entry and distress, to reimburse to the purchasers the annuity paid, and the costs incurred by them, might be granted, without the creation of any estate in the lands on which the distress was to be exercised; as in the case, somewhat resembling the present, stated from *Moore*, in 6 *Viner*, 393. *pl.* 11. (*a*): but here is a perpetual rent-charge in fee, with power of entry, and distress, and perception of rent, till the arrears are paid. A stronger objection, and not entirely removed, is, that a rent-charge, merely co-extensive in amount with the original annuities, is not sufficient. Under the terms of this deed, the purchasers of the rest of the estates are not to call on the owner of lot 1., until they have been compelled to make payment; but all resistance to the demands of the owners of the original rent-charges, every distress and litigation, must be attended with expense; on the death of the two persons appointed trustees, an expense may be incurred

(*a*) *Allen* v. *Givers*, *Moor.* 179. 185.; and see *Bro. Abr. Distresse*, pl. 1. *Vawser* v. *Jeffery*, *ante* p. 274.

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in ascertaining their heir. It is difficult to maintain that by providing to the extent of the rent-charges, sufficient provision is made for costs and expenses. All charges are to be paid from 140*l.* a-year: that can hardly be considered an adequate security. What objection is there to give a right of distress for that sum, and so much more as may be necessary to provide for all expenses? That seems requisite to complete indemnity.

It is suggested that some part of the original rent-charges has been already paid, and that the indemnifying rent-charge is therefore an accumulating fund: that is for the consideration of the Master, in determining whether an addition should be made, either in the phrase, or in the amount, for securing a complete indemnity against every liability to which neglect or resistance may give occasion in any future time. The number of the trustees is also a subject of doubt. Before any steps are taken for the indemnity of the purchasers, notice is to be given by the trustees, or their heirs, to the owner of lot 1.; if they are absent from the kingdom, or if any difficulty arises in determining who is heir, or if the heir is an infant, what remedy have the purchasers? A better provision should be made for the nomination of trustees, with the concurrence of the persons interested in the trust.

Some of these inconveniences may be removed by increasing the number of trustees, and authorising the purchaser called on for payment, to give notice, instead of the trustees; and rendering it imperative on the trustees immediately to levy the amount stated in the notice. It will deserve consideration, also, whether the deed of indemnity should not be in some way notified to all future purchasers of lot 1., as by an indorsement on the purchase

chase deed; and whether the purchasers of the rest of the estates should not have copies of it, in order to know to whom they must resort for indemnity.

I do not say what weight is in these observations; still less that these are the only observations to be made. The deed seems extremely well framed, but may admit some improvement to render it a better security for the petitioner, who was not present when it was discussed before the Master.

I think, therefore, that the eighth condition of sale ought to receive the limited construction which I have stated; but in carrying it into execution, the Court is bound to secure to the purchasers every possible indemnity. The deed should be again submitted to the Master, that the petitioner may have an opportunity of specifying what alteration he propose

"His Honor doth order, that the exception taken by the said *J. H. P. Schneider* to the Master's report, dated the 7th day of *May*, 1817, so far as relates to the title of the premises purchased by him, be overruled. And it is ordered, that it be referred back to the said Master, Sir *John Simeon*, Bart., to review his report dated the 3d of *March*, 1817, as to approving of the deed of indemnity in the petition mentioned. And it is ordered, that the said Master do revise, and if he shall judge necessary, alter, the said deeds in such manner as the said Master may think proper. And it is ordered, that the said *P. Thomson* do perform the eighth condition of sale in the petition mentioned, for causing the annual payments in the petition mentioned, to be charged upon, and paid by, the owners of lot 1. only, by executing such deed of indemnity, when so revised or altered, or as finally settled by

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by the said Master, as he shall direct. And any of the parties are to be at liberty to apply to this Court as there shall be occasion."

Reg. Lib. A. 1818. fol. 1896.

April 7. June 25. 27.

Ex parte JENNINGS *in re* DAWSON.

Equitable mortgages of a bankrupt's estate are not comprehended within the general order of the 8th of *March*, 1794. On the petition of an equitable mortgagee, the Court may, in the first instance, decide the validity of his claim, and that decision is conclusive on the commissioners.

THE petition stated, that after the order pronounced by the Vice-Chancellor on the former petition (*a*), a *qui tam* action was brought by one of the assignees against the petitioner, to recover penalties for the usury alleged to have been committed in the transactions in which the petitioner's debt originated; and the Plaintiff having been nonsuited, the petitioner obtained judgment; and that the petitioner, attending before the commissioners to prove his debt, desiring to waive all claim to the renewed lease, and the counsel for the assignees proposing to examine the petitioner touching the alleged usury, on his objecting, a difference of opinion arose among the commissioners, whether they were at liberty to enter upon such examination. The petition prayed an order on the commissioners to permit the petitioner to prove his debt of 5000*l.*, and interest, and that he might be ordered to receive dividends thereon *pari passu* with the other creditors under the commission, the petitioner waiving, for the benefit of the bankrupt's estate, all claim to the renewed lease; and that the expense attending the several meetings before the commissioners, and of the petition, might be paid by the assignees out of the bankrupt's estate; and that a public meeting

(*a*) 1 *Madd.* 331.

might

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might be forthwith called by the assignees at the expense of the bankrupt's estate, for the proof of the petitioner's debt.

Sir *Samuel Romilly* and Mr. *Cullen*, for the petition, insisted, that the Vice-Chancellor having declared the petitioner entitled to the benefit of the mortgage, the commissioners were not at liberty to receive objections to his proof; that the great seal has an original jurisdiction to decide on the validity of debts claimed under a commission of bankrupt; and that, after an order had been pronounced, it was too late to allege a defect of jurisdiction. They referred to stat. 34 and 35 *Hen.* 8. *c.* 4. never expressly repealed, and to stat. 21 *Jac.* 1. *c.* 19. *s.* 9, as conferring on the commissioners powers which must have been previously exercised by the great seal.

Mr. *Hart*, and Mr. *Montagu*, against the petition, contended, that the commissioners possessed exclusive original jurisdiction on the question of proof, and that the great seal could not receive a petition for impeaching or establishing a debt, except on appeal from a previous judgment of the commissioners. They cited *Ex parte King*(*a*), *Ex parte Roscoe* (*b*), *Anon.* 30 *Apr.* 28 *Car.* 2. (*c*) (the first case in which the Lord Chancellor assumed an appellate jurisdiction on questions of proof of debts), *Ex parte Wright* (*d*), *Exparte de Tastett* (*e*), *Ex parte Wilson* (*f*), *Ex parte Schmaling* (*g*), *Ex parte Moody* (*h*) (a case in which the question was, not whether the debt was provable, but who should prove).

(*a*) 11 *Ves.* 417.
(*b*) 2 *Rose*, 345.
(*c*) 1 *Ca. in Cha.* 275.
(*d*) 2 *Ves. jun.* 41.
(*e*) 1 *Ves. & Bea.* 280.
(*f*) 1 *Cox.* 308.
(*g*) 1 *Buck.* 93.
(*h*) 2 *Rose*, 413

 The

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The LORD CHANCELLOR.

Prior to Lord *Rosslyn*'s order (*a*), the course, with legal mortgages, was the same which is now observed with equitable mortgages; each person claiming as mortgagee applied, in the first instance, to the great seal. Every objection to the mortgage was open to those who thought proper to oppose a petition of that kind; and if it appeared that the consideration of the deed was usurious, the Lord Chancellor must have dismissed the petition, declaring, that the party could not claim as a creditor under the deed. The necessity of coming to the great seal, in the first instance, arose out of the nature of the transaction; for if the mortgagee went, in the first instance, before the commissioners, they might indeed take an account of what was due, but could make no arrangement for payment by sale of the estate. The great seal seems not to have originally entrusted the commissioners with transactions of that kind. The course was so constant of an application here, and a reference to the commissioners, that Lord *Rosslyn* thought himself authorised to pronounce a general order, which, of necessity, imposed on the commissioners the duty of examining questions which had been formerly examined by the great seal. Lord *Rosslyn* did not include, in that order, equitable mortgages (*b*); they are objects of more difficult consideration. The question, whether a writing or agreement operates as a mortgage, is not so easy as, whether a mortgage-deed is a mortgage. But, as before that order, the claim of a legal mortgagee might have been opposed, on the ground that the consideration was usurious, and the deed therefore a nullity; so, on the petition of parties claiming as equitable mortgagees, not having the benefit of that order, it may be objected, that

(*a*) *March* 8th, 1794. 1 *Bro. C.C.* 518.

(*b*) *Ex parte Payler*, 16 *Ves.* 434.

the

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the consideration was usurious, and the Court is competent to decide that question; and seeing a clear case of vicious consideration, is bound to negative the claim; with the power, in doubtful cases, of directing an issue, or, by special order, delegating the inquiry to the commissioners. Should the Court erroneously decide in favour of the mortgage, the error may be rectified on rehearing; but I have no notion that the jurisdiction can be questioned. If, in the first instance, the parties meet before the Court, on the agitation, and for the decision, of a question involving the validity or nullity of the mortgage, the commissioners have nothing to do with that question, except by special order. When the parties come here, stating, in answer to a petition to go before the commissioners to have an estate subject to an equitable mortgage sold, that not merely on the true construction, it is not an equitable mortgage, but that the consideration is not good, and the Court decides that question, the commissioners are bound by the decision. That is all that I mean to decide. *Primâ facie*, if a deed of mortgage, for a sum ascertained, is produced, the Court takes that sum to be due; if, before the general order an objection, that the consideration was usurious had been made to the petition of a legal mortgagee, and the Court had sustained the objection, the petition must have been dismissed: and an order on the petition of an equitable mortgagee has the same effect as an order on the petition of a legal mortgagee before the general order.

The order of the Vice-Chancellor having decided that the debt is not usurious, the commissioners cannot agitate that question; if the parties are dissatisfied with the decision, their course is to present a petition to displace that order.

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July 6, 1818. "I do order, that the said commissioners, or the major part of them, do permit the petitioner to prove his said debt of 5000*l.* and interest, under the commission issued against the said *W. Dawson*, and that the petitioner be paid dividends thereon, *pari passu* with the other creditors seeking relief under the said commission, the petitioner hereby waiving, for the benefit of the said bankrupt's estate, all claim to the said renewed lease. And I do order, that the costs attending the said several meetings, before the said commissioners, the costs of the meeting of the said commissioners for the proof of the debt directed by this my order, together with the costs of, and occasioned by, the present application to me, be paid and borne out of the estate and effects of the said bankrupt: such costs to be settled by the said commissioners, in case the parties differ about the same." Orders in Bankruptcy, Lib. 149. p. 13—22.

END OF THE SECOND PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

1818.

June 24, 25.

NICLOSON *v.* WORDSWORTH.

Bill by a vendee for specific performance, insisting that the vendors could not make a good title, dismissed with costs. Effect of a disclaimer by a trustee, and of a release with intent to disclaim.

THE bill, filed on the 25th of *June* 1817, stated, that in *December* 1816, the Defendants *Christopher Wordsworth* and *William Wordsworth*, caused to be advertised for sale by auction, two closes of freehold land, which, in the particulars of sale, were described to be part of the estate of *Richard Wordsworth*, deceased, and to be offered to sale by *C. Wordsworth* and *W. Wordsworth*, as devisees in trust named in the will of *R. Wordsworth*, who were thereby directed and empowered to sell the same; that one of the conditions of sale purported, that the highest bidder being the purchaser should be let into possession on the 25th of *March* then next; and another, that he should pay a deposit of 10 *per cent.*, which should be forfeited if he did not perform the conditions of sale; that the Plaintiff was declared the purchaser, and signed

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the following memorandum: — "Be it remembered, that the above-mentioned premises comprised in the above-mentioned two lots, were, this day, struck off and sold to *John Nicloson* of *&c.*, the highest bidder, at the price or sum of 305*l.*; and the said *J. Nicloson* doth hereby promise and agree to perform the conditions above contained on the part of the purchaser; and the said *W. Wordsworth*, on behalf of himself, and the said *C. Wordsworth*, hereby agrees to perform the conditions on the part of the vendors, as witness, *&c.*" That the Plaintiff paid 30*l.* 10*s.* as a deposit, and was let into and still retained possession of the premises, and had, on the faith of the agreement, expended considerable sums of money in draining the lands, and otherwise in the improvement thereof; that *Charles Wordsworth* and *W. Wordsworth* having delivered an abstract of the title to the premises, the counsel of the Plaintiff advised, that they could not alone convey the premises, or give a discharge or acquittance for the purchase-money, and that the Plaintiff would be bound to see to the application of the purchase-money to the purposes and upon the trusts of the will of *R. Wordsworth*, from whom *C. Wordsworth* and *W. Wordsworth* derived their title, unless the contract was carried into execution under the direction of the Court; that the Plaintiff was willing to execute the contract, and had requested *C. Wordsworth* and *W. Wordsworth* to procure all proper parties to join in the conveyance and receipt; and that *C. Wordsworth*, and *W. Wordsworth*, and *Thomas Hutton*, a third Defendant, had caused an action of ejectment to be brought against the Plaintiff to recover possession of the premises.

The bill, charging that *T. Hutton* was a trustee only of the premises, and suffered his name to be used in the action at the instance of the other Defendants, prayed the specific performance of the agreement, and that the Defendants

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Defendants might be decreed to make and execute, and procure to be made and executed to the Plaintiff, a good and sufficient conveyance of the premises, with a good title, and make, and procure to be made, to the Plaintiff, a sufficient discharge of the purchase-money, or that such purchase-money might be paid into the bank in the name and with the privity of the accountant-general; the Plaintiff offering to perform the agreement on his part, and to pay the remainder of the purchase-money, on having the premises duly conveyed to him with a good title. The bill also prayed an injunction against proceeding in the action of ejectment.

The answer of the Defendants stated the will of *Richard Wordsworth*, dated the 6th of *May* 1816, devising the premises to the Defendants and their heirs, in trust to sell, and apply the money produced by such sale in aid of the personal estate, towards payment of his debts, funeral expenses, and certain legacies, with a declaration, that the receipts, in writing, of his trustee or trustees for the time being, should be a good discharge to the purchaser of the premises, and that it should be lawful for the trustee or trustees for the time being, by any writing or writings, to appoint a new trustee or trustees, in lieu of any trustee or trustees who should die, or desire to be discharged, or refuse, or decline, or become incapable, to act, and appointing the Defendants his executors, and *Jane Wordsworth*, widow, his executrix; that *Jane Wordsworth*, and the Defendants *C. Wordsworth* and *W. Wordsworth*, alone proved the will; but that the Defendant *Hutton* renounced probate, and declined to act in the trusts of the will, and executed an indenture of release, bearing date the 23d of *December* 1816, and made between *Hutton* and *C. Wordsworth*, whereby *Hutton* bargained, sold, released, quitted claim, and conveyed to *C. Wordsworth* and *W. Wordsworth*, their heirs

 and

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and assigns, all and singular, the lands, tenements, and real estate of *R. Wordsworth*. The answer admitted the sale as stated in the bill, and submitted that *C. Wordsworth* and *W. Wordsworth* could alone make an effectual conveyance, and give to the Plaintiff a sufficient discharge of the purchase-money of the premises.

The common injunction having been obtained for want of an answer, and the common order *nisi* for dissolving it after answer, on this day cause was shown by

Sir *Samuel Romilly* and Mr. *Roupell*, for the Plaintiff.

The release executed by the Defendant *Hutton* was an acceptance of the estate devised to him, and he is therefore a necessary party to the conveyance. The deed admits, that an estate vested in him; of that estate he is trustee; and it is not competent to him, after he has assumed that character, to renounce it without performance of its duties: for this reason the release cannot operate as a disclaimer. *Crewe* v. *Dicken*. (*a*)

Mr. *Bell* and Mr. *Shadwell*, for the Defendants, insisted, that, in a court of equity, at least, the intention of the parties determined the effect of the instrument, and a release, with the purpose of disclaiming, would be equivalent to a disclaimer.

The LORD CHANCELLOR.

The question comes before the Court in a singular shape. I understand that *Hutton* was not a party to the contract; the Plaintiff therefore cannot insist on his being a party to the conveyance. If the suit had been

(*a*) 4 *Ves.* 97.

instituted

instituted by the Defendants against the Plaintiff, the Court must have decided the question, whether the Defendants could make a good title; but, is the form of the record such that any judgment can now be pronounced? The Plaintiff has filed the bill for specific performance; himself insisting that his vendors cannot make a good title. I can say only, that if he does not choose to take the title which they can give, he can have no decree. To raise the question properly on the record, the Defendants should have been Plaintiffs. The injunction must of necessity be dissolved if the Plaintiff will not accept the title of the Defendants. When, on a bill by a vendee, for specific performance, it appears that the Defendants cannot make a good title, there is no farther question in the cause, than who is to pay the costs. If the Plaintiff insists that the title is not good, he cannot resist the ejectment of those who were previously in possession of the land. Rejecting the title, he must relinquish possession.

The question is curious as a point in conveyancing. It seems to have been taken for law, from an older period than the date of *Crewe* v. *Dicken* (*a*), and sanctioned by Lord *Hale* (*b*), that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and, under his hand and seal, declares that he disclaims, that is, dissents from

(*a*) 4 *Ves.* 97.

(*b*) *Smith* v. *Wheeler*, 1 *Vent.* 128. 2 *Keble*, 772. *S. M.* being possessed of a term of years, assigned it on certain trusts, to *B.* & *C.*, of whom *B.* dissented; the Plaintiff claiming under a demise by *C.*, recovered. The dictum of Lord *Hale* is thus reported by *Ventris*, "*C.* is a good lessor, for the other trustee's disagreement makes the estate wholly his." (1 *Vent.* 130.) And by *Keble* in these words; "The assignment being of a chattel is in both the assignees, till the disagreement of *B.*, and then is wholly in *C.*" 2 *Keb.* 774.

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being a trustee, the fact must be taken to be, that he is no trustee; but in *Crewe* v. *Dicken* the difficulty occurred, that instead of doing this, the party conveyed his estate to the other trustees. Lord *Loughborough* thought that that was different from a mere disclaimer, because he could not execute a release without having assented to the conveyance to himself. In that case there were also specialties; the individuals were particularly described, and the directions for the form of the receipt were such as made it impossible that a proper receipt could be given, unless the trustee, who had disclaimed, joined. If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity. If the contract were mine, and I approved the bargain, I should abide by it; but that opinion will not assist the party.

June 25.

The LORD CHANCELLOR.

Either the Plaintiff must take such title as the parties with whom he has contracted can give him, or he cannot have a conveyance. If the vendors had been Plaintiffs, the Court must have determined whether the title was good; here the purchaser claims specific performance, at the same time insisting that his vendors cannot make a good title. If I could have considered this deed as a mere deed of disclaimer, then, on the authority of Lord

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Hale (*a*), and subsequent cases, though I do not understand the principle, I might have held that the two other trustees could make a good title; but a release, referring to an interest which the releasor supposes to be in him, introduces the doubt in *Crewe* v. *Dicken*. The question is, whether the three parties must join in the conveyance and receipt? A release is the instrument of a person who thinks that he has something to part with; it is not a mere dissent or refusal to concur. I argued the case of *Crewe* v. *Dicken* on various grounds; and I recollect that the words relative to the receipt were very special.

The more one examines the distinction between disclaimer and release, the less one sees the worth of it. In this will the testator declares that the receipt of the trustee or trustees for the time being, shall be a sufficient discharge; but the shape of the record is such that I cannot decide the question. My opinion is, that if a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the Court to act upon. What is the thing called a disclaimer? I have seen some prepared by the ablest conveyancers in a form like this: "I hereby declare that I have disagreed, and hereby disagree, *&c.*, and hereby disclaim, *&c.*" What is the effect of that? That is sufficient. I can find no case which has decided, nor can I see any reasons for deciding, that where the intent of the release is disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it. The decree in *Crewe* v. *Dicken* did not proceed on that point only: the words describing the persons by whom the receipt was to be given were very special; in that case, if two out of the three trustees had died, the third having previously released to them, beyond doubt

(*a*) *Ante*, p. 369. n.

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that survivor must, under the words, have given the receipt, though he did not continue trustee. I think there is no case in which judgment has been pronounced on the distinction between a disclaimer and a release, and that where the intention is disclaimer there ought to be no distinction. I understand the operation of a release with intent to disclaim, but it is difficult to know what that thing called a disclaimer is.

Disclaimer under a conveyance to uses.

The case in *Ventris* is an assignment of a lease to two persons, one of whom expresses his dissent; but if we consider the difficulty attending conveyances to uses, I think that we shall be compelled to say, that Lord *Hale*'s doctrine will not apply, and that the party cannot disclaim in the case of a conveyance to uses, except by release with intent of disclaimer. I am aware, however, that, from the practice of conveyancers, if I were to say that, on any difficulty in principle, a disclaimer could not be effectual, I should shake titles innumerable. (*a*)

The following decree was taken by consent: "It appearing to the Court, that the release bearing date the 23d of *December* 1816, was meant to operate as a disclaimer, His Lordship doth declare, that the Defendant *T. Hutton* is not a necessary party to the conveyance: and it is ordered, that the Plaintiff's bill be dismissed with costs: and it is ordered, that all proceedings in the ejectment be stayed, the Plaintiff undertaking to complete the purchase."

Reg. Lib. B. 1817, fol. 1323.

(*a*) See in addition to the cases cited, *Littleton*, sect. 684, 685. Stat. 21 *H*. 8. c. 4. *Co. Litt.* 113. a. *Bonifaut* v. *Greenfield*, *Cro. El.* 80. *Godb.* 77. *Anon.* 4. *Leon.* 207. *Hawkins* v. *Kemp*, 3 *East*, 410. *Towns* v. *Tickell*, 3 *B.* & *A.* 31.; and *Thompson* v. *Leach*, 2 *Vent.* 198. *Carth.* 211. 250. 3 *Mod.* 296. 2 *Salk.* 616. *Show. P. C.* 151. 3 *Lev.* 284. 1 *Show.* 296. *Rep. Temp. Holt*, 665.

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BUTLER *v.* BULKELEY.

June 30.
July 18.

On a bill for discovery, and a commission to examine foreign witnesses in aid of an action at law, a motion that the Plaintiff might communicate to the Defendant the interrogatories exhibited by him, was refused.

THE bill was filed by the Plaintiff in an action at law, praying a discovery and a commission for the examination of witnesses abroad in aid of the action.

A motion was made in behalf of the Defendant, that the Plaintiff might communicate to the Defendant the interrogatories exhibited by the Plaintiff.

Mr. *Heald* in support of the motion.

Without a knowledge of the Plaintiff's interrogatories, the Defendant will be unable to cross-examine with effect. A plaintiff at law may obtain a commission for the examination of witnesses abroad, by two methods — an application to the court of law, or a bill in equity. In the first case, the practice requires him to communicate his interrogatories to the Defendant (*a*); what reason can be assigned for relieving him in equity from an obligation imposed by obvious principles of justice?

Mr. *Bell* against the motion.

By the universal practice in equity, one party is not entitled to see the interrogatories exhibited by the other, but must judge by the record, to what point the evidence of his antagonist will apply. There is no distinction, nor any reason for distinction, in this respect, between a suit for relief in equity, and a mere bill for discovery and a commission.

The Lord Chancellor.

The ancient course in *Westminster* Hall was, to apply

(*a*) 1 *Tidd's* Practice, 312.

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to this Court for commissions for the examination of witnesses in foreign countries; and the courts of law borrowed that proceeding from this court: but in no suit in equity has one party been permitted to see the interrogatories exhibited by his antagonist. The constant practice through all time has been, to grant commissions without communication of the interrogatories. At law, indeed, that communication is required; but I believe that the courts of law established that practice under an erroneous belief that it prevailed here. The proceeding in aid of an action at law by a commission for the examination of witnesses, is far more ancient in this Court than in courts of law; and I find no instance in which a production of the interrogatories has been ordered.

Mr. *Heald* suggested, that the case contained special circumstances, the instrument on which the action was founded being a forgery, executed by chemical means.

The LORD CHANCELLOR.

Rules of practice yield to special circumstances.

There is no rule of practice in this Court which will not yield to special circumstances; but the allegation of such circumstances must be verified by evidence.

Motion refused. (*a*)

(*a*) On commissions to examine witnesses in foreign countries, see *Bowden* v. *Hodge*, *ante*, p. 258., and the cases there cited; to which may be added *Campbell* v. *Scougal*, 19 *Ves.* 552.

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July 16, 17, 18.

RICHARD HAWKINS, and MARY, his Wife, and JOHN HAWKINS, - - PLAINTIFFS;

AND

JOHN LUSCOMBE LUSCOMBE, MARGARET MANNING, JOHN HURRELL LUSCOMBE, Heir of the surviving Trustee, and JOHN LUSCOMBE, - - DEFENDANTS.

Estates being devised to trustees and their heirs, upon trust, to permit *M. M.*, *M. C.*, and *J. J.*, to reside in a mansion house, and receive part of the rents, in recompense of the maintenance of *J. L. M.*, (eldest son of *M. M.*) till he attained 21, or died, and subject thereto to the use of the trustees and their heirs, in trust for *J. L .M.*, until he should attain 21, or die, and to the intent that the rents might be accumulated, and after he attained 21, to the use of him and his assigns, during his life, he taking the testator's surname of *L.;* remainder to the use of the trustees, and their heirs, during his life, to support contingent remainders; remainder to the use of his first and other sons, taking the surname of *L.*, in tail male; remainder to the use of the second and every other son of *M. M.* by her present husband; remainder to her first and every other son by any future husband, in tail male, taking the surname of *L.*; remainder to the use of the trustees and their heirs, during the life of *M. M.* upon trust for her separate use; remainder to the use of the trustees, and their heirs, during the life of *M. C.* upon trust for her separate use; remainder to her first and other sons taking the surname of *L.* in tail male, with ulterior remainders, and a proviso, that the heirs male of the bodies of *M. M.* and *M. C.* claiming under the will, should, on taking possession of the estates, assume the surname of *L.*, and, within three years, procure their name to be altered by act of Parliament, or some other effectual way; and in case they should neglect to obtain an act of Parliament, or some other authority as effectual, for three years after being in possession, then the use and estate limited to the person so neglecting should cease and become void, and the estates should vest in the persons next in remainder, as if the person so neglecting were dead without issue; *J. L. M.*, in 1794, having attained 21, taken possession of the estates, and assumed the name of *L.*, but neglected to obtain an act of Parliament, or any other authority for the use of that name, and having had a son born in 1806, and *M. M.* having died without other sons; on a bill by *M. C.*, insisting that *J. L. M.* had forfeited the estates, the Court refused to appoint a receiver, or, infants (who are not bound by admissions) being interested, to direct a case. — What uses are executed in the trustees? — *Quære.*

THE original bill, filed on the 12th *June* 1817, stated, that *John Luscombe*, deceased, by his will, dated the 3d of *February* 1774, devised (subject to certain annuities and legacies) unto *Thomas Whinyeats*, *Thomas Coplestone Prideaux*, and *Roger Prideaux*, and their heirs, certain messuages, tenements, and hereditaments, upon trust, to permit his nieces, *Margaret Manning* and *Mary Creed*, (afterwards *Mary Hawkins*,) and *Juliana*

Jutsham,

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Jutsham, and the survivors and survivor of them, her executors or administrators, to inhabit a mansion-house described, and take the rents and profits of a part of the premises as a recompense for their care, maintenance, and education of the testator's cousin, *John Luscombe Manning*, afterwards *John Luscombe Lusbombe*, son of *M. Manning*, who he willed should live therewith, and be well provided for and maintained by them in all respects suitable to his condition, during so many years as should expire, until he should attain the age of twenty-one years, or die, which should first happen; and subject to the said trust-estate, as to the whole of the premises, to the use of *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, in trust for *John Luscombe Manning*, until he should attain twenty-one or die, which should first happen, and to the intent that the same might, in the mean time, be set out at yearly rents, and that the clear rents and profits, after a deduction for repairs, &c. should, from time to time, be invested in the public funds, and the interest thereof accumulated and made principal money, for the benefit of *John Luscombe Manning*, until he should attain the age of twenty-one years, when the same should be transferred or paid over to him for his own use; and in case of his death, in the meantime, the same should go to his executors or administrators to the time of his death; and immediately after he should attain the age of twenty-one years, then to the use of him and his assigns, during the term of his natural life, without impeachment of waste, he taking and using the testator's surname of *Luscombe* as, and for, and instead of his own surname; subject, as to part of the premises, to several annuities, and, as to other parts, to certain terms of years; remainder to the use of the trustees and their heirs, during the life of *John Luscombe Manning*, upon trust, to support contingent remainders, but nevertheless to permit him and his assigns to receive the rents and profits during his life, and immediately after his decease

to

to the use of the first son of the body of *John Luscombe Manning*, lawfully to be begotten, taking and using the testator's surname of *Luscombe* as and for his and their own surname, and of the heirs male of the body of such first son lawfully issuing, taking and using the testator's surname as, for, and instead of his and their own surname; with remainder to the use of the second, third, and every other son of the body of *John Luscombe Manning*, *&c.* in tail male, taking and using the testator's surname of *Luscombe*, *&c.*; remainder to the use of the second, third, and every other son on the body of *Margaret Manning* lawfully begotten, or to be begotten, by *R. Manning*, her then husband, and in default of such issue, *&c.* to the use of the first, second, and every other son on the body of *Margaret Manning* lawfully to be begotten by any after-taken husband or husbands, in tail male, taking and using the testator's surname of *Luscombe*, *&c.*; remainder to the use of the trustees and their heirs during the life of *Margaret Manning*, (subject as aforesaid,) upon trust, and for the sole, distinct, and separate benefit of her, exclusive of her said husband and every other husband which she should have, and to the intent that the trustees, and the survivors and survivor of them, and his heirs, should receive and take the rents and profits of the premises, and pay the clear produce of the same, after deduction and allowance, from time to time, for taxes, repairs, *&c.* unto and into the hands of *Margaret Manning*, and her only, for her own sole and separate use and benefit, distinct and apart from her then present or any other after-taken husband or husbands, and her receipt or receipts alone, from time to time, to be sufficient discharges for the same, notwithstanding her coverture; and after the decease of *Margaret Manning*, to the use of the trustees and their heirs, during the life of the testator's niece *Mary Creed*, afterwards *Mary Hawkins*, (subject as aforesaid,) upon trust, for her sole, distinct, and separate benefit, whether sole or

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under coverture, and to the intent that the trustees, and the survivors and survivor of them and his heirs, should receive the rents and profits of the premises, and pay the clear produce of the same, (after such deduction and allowance as aforesaid,) unto and into the hands of *Mary Creed*, whether sole or under coverture, and her only, for her own sole and separate use, distinct and apart from any husband or husbands which she might have, and her receipt and receipts, from time to time, to be good and sufficient discharges for the same, notwithstanding coverture; and immediately after her decease to the use of the first son of her body, lawfully to be begotten, using and taking the testator's surname of *Luscombe*, *&c.*, and of the heirs male of the body of such son lawfully issuing, (subject as aforesaid,) with remainder to the use of the second, third, and all and every other sons of the body of *Mary Creed*, in tail male; with divers remainders over, with the ultimate remainder to the use of the testator's right heirs; and other tenements and hereditaments the testator devised to *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, upon trust, for *John Luscombe Ryan*, until he should attain the age of twenty-one years, or die, which should first happen, and to the intent that the premises, or such part or parts of the same as should not be out in lease, should be set out at a yearly rent or rents, until *J. L. Ryan* should attain the said age, or die, and the clear rents and profits of the premises, after a deduction for all rates, taxes, *&c.*, or as much thereof as the trustees, or the survivors or survivor of them or his heirs, should in their discretion see fit, should be applied towards the maintenance and education of *J. L. Ryan*, and for placing him out apprentice, *&c.*, and the surplus should be invested in the public funds, or placed out at interest, in the names of the trustees, on real or personal security, and the interest thereof applied for the purposes aforesaid,

aforesaid, or otherwise accumulated, to be made principal-money for the benefit of *J. L. Ryan*, until he should attain that age, when the whole should be transferred or paid to him for his own use, after such deductions as aforesaid, and also after a full allowance of all sums paid or disposed of for or on his account, or in case of his death, before he should attain that age, then for the benefit of his executors or administrators to the time of his death; and immediately after he should have attained the age of twenty-one years, then to the use of him and his assigns for his life, with remainder to the trustees and their heirs, during his life, upon trust, to preserve contingent remainders, but to permit *J. L. Ryan* and his assigns to take the rents and profits of the premises to his and their own use, during the term of his life, and immediately after his decease to the use of *John Luscombe Manning* and his assigns, during the term of his life, without impeachment of waste, except voluntary waste in houses and buildings; remainder to the use of the trustees and their heirs, during the life of *John Luscombe Manning*, upon trust, to preserve contingent remainders, but to permit him and his assigns to take the rents and profits of the premises, during his life, and after his decease to the use of such persons respectively and in such order and course, and for such estate and estates, *&c.*, as the other premises were limited, subsequent to the limitation to the trustees for the life of *John Luscombe Manning*, to preserve contingent remainders; and other tenements and hereditaments the testator devised to *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, to the use of *Juliana Jutsham* and her assigns, for her life, without impeachment of waste, except waste in houses and buildings; with remainder to the use of the trustees and their heirs, during her life, upon trust, to preserve the contingent uses and estates thereinafter limited, but to permit her and her assigns to receive the rents

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rents and profits of the premises, during her life, and after her decease, to the use of *John Luscombe Manning* and his assigns, for his life; with like remainder as in the former devises.

The will contained the following proviso:—"Provided always, and it is my express will, and I do hereby empower, direct, and appoint, that the heirs male of the several body and bodies of the said *M. Manning* and *M. Creed*, and that the said *J. L. Ryan*, and the heirs male of his body, and each and every of them respectively claiming, or that shall claim, by, under, or in virtue of this my will, or any of the limitations, directions, or devises herein contained, any right, estate, or title in or to the capital messuage, and tenement, &c. or any other of the lands or hereditaments comprised in the first devise of this my will contained, not bearing the surname of *Luscombe*, shall, when and as soon as he or they, or any of them, shall be respectively in possession of the same premises, or any part thereof, under, or by means, or in virtue of this my will, take upon him or themselves the name of *Luscombe*, and use the same as, for, and instead of his or their own surname as aforesaid, and shall within three years then next after, get and procure his or their own name or names to be altered and changed to my name of *Luscombe*, by act or acts of parliament, or some other effectual way for that purpose, and shall for ever after have, use, and bear on all occasions the said surname of *Luscombe*, for him and them, and the heirs male of his and their body and bodies as aforesaid; and in case any or either of the heirs male of the body of the said *M. Manning*, or *M. Creed*, or the said *J. L. Ryan*, or the heirs male of his body, or any or either of them respectively, who shall be in possession of the said capital messuage, &c. or any part thereof, by, under, or in virtue of this my will, shall not use and take my said surname, but shall neglect to get

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get an act of Parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he, she, or they shall be in possession of the same as aforesaid, that then and in such case the use and estate hereby given, devised, or limited, of and in the same premises, to and for the benefit of such person or persons so neglecting to get, or not getting, such act of Parliament, or other authority as aforesaid, shall cease, and become void, as if no such use or estate had been hereby given, devised, or limited; and the same premises, and every part thereof, shall, immediately upon and after the expiration of the said three years, go over to and descend upon, and vest in, such person or persons as shall be next in remainder or reversion, or unto and upon whom the said premises are hereby settled, given, devised, or limited, in the same manner, to all intents and purposes, as if such person or persons so neglecting to change his or their surname or surnames was, were, or had been dead without issue of his or their body or bodies, any thing herein contained to the contrary notwithstanding; upon this express condition, nevertheless, that such person so to take, do and shall also take my said surname, and get an act of Parliament, or such other effectual authority for so doing as aforesaid, otherwise the said capital messuage, &c., and all other the premises first hereby devised, shall go over to the next person to whom the same are limited as aforesaid, who shall so take my surname as aforesaid."

The bill further stated, that by a codicil, dated the 8th of *June* 1777, the testator appointed *J. Luscombe* a trustee; and died on the 3d of *July* 1776; that *J. Luscombe Ryan* died in the lifetime of the testator, and *J. Jutsham* in *November* 1787; that *J. Luscombe* survived his co-trustees, and died in *August* 1811, leaving *J. Luscombe* his eldest son and heir; and that *M. Creed*, in *June*

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1779, intermarried with *R. Hawkins*, by whom she had two sons, *John Hawkins* and *Abraham Mills Hawkins*, who had both attained the age of twenty-one years; that *John Luscombe Luscombe*, in the will named *John Luscombe Manning*, was the only son of *Margaret Manning*, and that, upon his attaining the age of twenty-one years, on the 28th of *April* 1794, he entered into the possession of the premises devised, including those devised to *J. L. Ryan* and *J. Jutsham* for life; but he did not thereupon take and use the name of *Luscombe*, instead of his own surname, nor did he, within three years then next after, procure his own name to be changed to the name of *Luscombe*, by act of Parliament, or any other effectual way; and he never, in fact, took or used the surname of *Luscombe*, or in any manner procured his name to be altered or changed to the surname of *Luscombe*, until he attained the age of forty years, or thereabouts; that, by reason of such breach of the condition in the will, the estate and interest of *John Luscombe Luscombe* in the devised premises became void, and *Margaret Manning*, as the next person in remainder, became entitled to the same for her life; that *John Luscombe Luscombe* did not marry until he was of the age of twenty-five years, and that *J. Luscombe*, his eldest son, was born in *December* 1806.

The bill also stated, that at the time when *John Luscombe Luscombe* entered into possession of the devised premises, there were large quantities of timber trees standing and growing thereon, and that he and *Margaret Manning*, or one of them, had since caused the same to be cut and felled, and sold considerable quantities thereof, and converted the money arising from the sale thereof to their own use; and that *Margaret Manning*, or *John Luscombe Luscombe*, by her authority, intended to cut other timber standing or growing upon the devised premises.

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The bill, charging that *J. L. Luscombe* and *Margaret Manning*, or one of them, had committed and suffered divers acts of waste and spoil on the premises, and felled divers timber trees standing and growing thereon, and other trees likely to become timber, prayed an account of all timber cut or felled upon the premises since the death of the testator, and the money produced by the sale thereof, and of all other acts of waste, since that time, committed upon the premises; and that the Defendants might be decreed to account for the same; and that *Margaret Manning* and *J. L. Luscombe* might be restrained by injunction from cutting any timber, or trees likely to become timber, upon the premises, and from committing any other waste or spoil thereon.

The supplemental bill, filed on the 9th of *December* 1817, stated the death of *Margaret Manning* since the institution of the suit, having appointed *Harriet Manning* executrix of her will, and leaving *J. L. Luscombe*, her only son; that, by means of her decease, the Plaintiff *Mary Hawkins* became entitled to an equitable estate for life in the devised premises, and that *John Hurrell Luscombe*, with the consent of *Margaret Manning*, permitted *J. L. Luscombe* to continue in possession of the premises during the life of *Margaret Manning*; that, since the filing of the original bill, *James Yates*, *Samuel Holditch Hayne*, and *John Hawker*, Defendants, claimed some interest in the premises by virtue of some indenture, whereby they pretended that the premises, or some interest therein, were assigned to them by *J. L. Luscombe*, or by some other person, in trust for his creditors.

The supplemental bill, charging that the title-deeds, and other papers relating to the premises, were in the possession of the Defendants, some or one of them,

prayed,

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prayed, that the Plaintiffs might have the relief prayed by the original bill, and that the Defendants, *J. L. Luscombe*, and *J. H. Luscombe*, and *J. Yates*, *S. H. Hayne*, and *J. Hawker*, might account for the rents and profits of the premises received by them, or either of them, or for their use, since the decease of *Margaret Manning*, and that it might be referred to one of the Masters, to appoint a proper person to receive the rents and profits, with directions to pay the same over to *Mary Hawkins* for her life; and that an account might be taken of all the timber cut or felled upon the premises since the death of the testator, *J. Luscombe*, and of the money produced by the sale thereof, and of all other acts of waste since that time committed upon the premises, and that the Defendants might be decreed to account for the same; and that the Defendants, *J. Yates*, *S. H. Hayne*, and *J. Hawker*, might respectively be declared to have no interest in the premises, and be decreed to deliver up to the Plaintiffs all deeds, papers, and writings in their or either of their power, custody, or possession, relating to the premises; and an injunction against *J. L. Luscombe*, and *J. Yates*, *S. H. Hayne*, and *J. Hawker*.

The answer of *J. L. Luscombe*, to the original bill, stated, that upon attaining the age of twenty-one years, in *April* 1794, he entered into possession of the premises devised to him, including those devised to *J. L. Ryan* and *J. Jutsham* for life, but denied that he did not take and use the name of *Luscombe* instead of his own surname, or that he never took or used the surname of *Luscombe*, or in any other manner procured his name to be altered or changed to the name of *Luscombe*, until he attained the age of forty years, or thereabouts; admitted that he did not, within three years next after entering into possession of the premises, procure his own name to be changed

changed to the name of *Luscombe*, by act of Parliament, but the same was altered or changed in the manner thereinafter mentioned; and stated, that when he entered into possession of the premises, there were large quantities of timber trees standing and growing thereon, and that he had since caused such parts thereof, as thereinafter mentioned, to be felled and sold, and applied the produce of such sales in paying two legacies of 500*l.* and 500*l.*, bequeathed by the testator to *Elizabeth Martin Manning*, and *Mary Manning*, and also in repairing and improving the premises, and in planting trees thereon, and denied that he threatened or intended at present, either by the authority of *Margaret Manning* or otherwise, to cut any timber then standing or growing upon the premises, except such timber as might be necessary for the repairs thereof, although he claimed the right of cutting timber under the will; denied that he had ever committed or suffered any act of waste or spoil on any part of the premises, but, on the contrary, had taken great care not to cut, or cause to be cut upon the premises, any saplings or trees likely to become timber. The answer further stated, that when he was of the age of fifteen or sixteen years, and at school, he took and used the surname of *Luscombe* instead of his own surname of *Manning*, and had ever since used the surname of *Luscombe* only, upon all occasions; and in *April* 1791, when he was of the age of eighteen years, he was entered a commoner, and afterwards admitted a gentleman commoner, at *Pembroke* college, *Oxford*, under the surname of *Luscombe*; and in 1794, when he came of age, he settled the accounts of the trustees of the devised estates, and gave all receipts and vouchers, in respect thereof, under the surname of *Luscombe* only, and that he had since held, in the surname of *Luscombe* only, a lieutenant's commission, and afterwards a captain's commission, in His Majesty's *North Devon* regiment of militia, and also a com-

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mission as a deputy-lieutenant in the county of *Devon*; and that in *April* 1796 a parish apprentice was bound to him under the name of *J. L. Luscombe*; and in 1797 he, under the surname of *Luscombe*, married his present wife; and in 1803 he was also made a freeman of the borough of *Plymouth* under that surname; and in *June* 1813 he obtained His Majesty's license for him and his issue to continue to use the surname of *Luscombe* only; and that license was, in *June* 1813 recorded in the College of Arms; and that since he was of the age of fifteen or sixteen years, in all his correspondence, he had signed, and used, and received letters under the surname of *Luscombe* only. The answer submitted that he ought not to be restrained from cutting such fir, or other timber and trees in the devised premises, as he might think proper.

By his answer to the supplemental bill *J. L. Luscombe* admitted, that he was in the possession and receipt of the rents and profits of the premises, and that the title deeds and other papers relating thereto were in his power; and stated, that the Plaintiffs *R. Hawkins* and *Mary* his wife, before he came of age, repeatedly told him, that there was no occasion for going to any expense about changing his name, and that he had already done all that was necessary, and that such was the opinion of the late Mr. Justice *Buller*, whom they had consulted upon the subject.

July 16.

On this day the Plaintiffs moved for a receiver.

Sir *Samuel Romilly* and Mr. *Hampson* in support of the motion.

The Defendant *J. L. Manning*, in the pleadings named *J. L. Luscombe*, not having complied with the condition of the will, has forfeited the interest limited by it to him and

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and his issue, and the Plaintiff *Mary Hawkins* is entitled to the possession of the estates. The Court will either entertain the suit, in order to decide the question itself, or will direct arrangements for obtaining a legal decision, and in either case will not suffer the Defendant to retain the estate, but will appoint a receiver.

The testator requires that the heirs male of *Margaret Manning*, claiming under his will, shall immediately on coming into possession take his surname, and, within three years, procure his name to be altered by act of Parliament, or some other equally effectual authority. A mere assumption of the name, without authority, is clearly not a compliance with this provision. The forfeiture is annexed to the omission to obtain some effectual authority within three years.

The LORD CHANCELLOR.

The question then is, whether the party forfeits, not only for himself, but for his issue, and who are the persons to take on that forfeiture?

Argument for the motion resumed.

The proviso (the words of which are direct and positive, not words of inference,) is not repugnant to the previous clause of gift. The limitations to the trustees to support contingent remainders, on determination of the particular estate, by forfeiture or otherwise, in the life of the tenant for life, are not designed to apply in case of forfeiture by non-compliance with the proviso for assuming the name. The forfeiture destroys those remainders which, in another event, the estate of the trustees would support. A condition inflicting forfeiture on the children, for the omission of the parent,

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may be unjust, but is not repugnant. The Defendant had no issue till many years after the forfeiture.

The legal estate is in the trustees. It is true the express trust is only till the Defendant attains twenty-one, but the whole legal fee having been conveyed to them, to the use of them and their heirs, subsequent words denoting an intention to vest the legal fee in other persons cannot have that effect. The Plaintiffs, therefore, are not in a situation to try the question at law; and though the Court will not compel the Defendant to put the question in a course for legal trial, it will, if he refuses, appoint a receiver. The proper mode will be to agree on the statement of a case.

They cited *Corbet's* case (*a*), *Co. Litt.* 327. a. note 2. *Nichols* v. *Sheffield* (*b*), *Doe* v. *Heneage* (*c*), *Carr* v. *Errol* (*d*), *Stanley* v. *Stanley*. (*e*)

Mr. *Heald* against the motion.

The Court will not, by a summary order on motion, eject a party who has had possession during twenty years since the alleged forfeiture. The general rule is, that possession is not changed pending the decision of the principal question in the cause; and on that principle the Court, in the recent case of *Cholmondeley* v. *Clinton*, refused to order payment into court of money arising from the sale of timber.

The question may be tried at law: during the minority of the Defendant, the legal estate was in the

(*a*) 1 *Co.* 83.
(*b*) 2 *Bro. C. C.* 215.
(*c*) 4 *T. R.* 13., see *Doe* v. *Hicks*, 7 *T. R.* 433.
(*d*) 6 *East*, 58.
(*e*) 16 *Ves.* 491.

trustees,

trustees, but on his majority it passed to him, *Goodtitle* v. *Whitby*. (*a*) The father having assumed the name of *Luscombe* long before the birth of a son, that son would be born a *Luscombe*, and by that name would take under the limitation. The Defendant, if the clause of forfeiture applies to him, which may be questioned, (for the words are, heirs male of *Margaret Manning*, a description not in strictness applicable to him then living during her life,) has complied with it: an assumption of a name, and constant use of it for all purposes, is as effectual a change as if authorized by act of Parliament or licence under the sign manual. (*b*) If the name has been assumed, the mode of assumption is immaterial. There is no means of compelling the continued use of a name: though assumed under an act of Parliament, it may be renounced. The proviso, as construed by the Plaintiffs, is repugnant, destroying the estate of the heir of the Defendant, which had been expressly limited on the forfeiture of the life-estate: an express limitation cannot be defeated by words of inference.

Sir *Samuel Romilly*, in reply, distinguished the case of *Cholmondeley* and *Clinton*, as involving an extremely doubtful question, agitated after long delay, and when the legal estate was in a mortgagee; while, in the present instance, the bill was filed within six months after the Plaintiff became entitled.

The LORD CHANCELLOR.

Under the original limitations, every person taking the estate, except *Mary Manning* and *Mary Creed*, is to assume the name of *Luscombe*; but the clause of forfeiture requires every person, without exception, to assume that name. The infancy of some of the parties

(*a*) 1 *Burr*. 228.

(*b*) See *Gulliver* v. *Ashby*, 4 *Burr*. 1929. p. 1940. *Leigh* v. *Leigh*, 15 *Ves*. 92. p. 100.

may

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may present difficulties in the admission of facts, for obtaining the judgment of a court of law; but, considering the nice distinctions in decided cases, I cannot determine the effect of such a will. At present I entertain doubt, whether any person could sustain an ejectment under the clause of forfeiture, without having assumed the name of *Luscombe*, and if so, whether they can file a bill here in any other name.

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In reference to the doubt intimated by the Lord Chancellor, Sir *Samuel Romilly* suggested, that the Plaintiff was not bound to assume the name before taking possession, and might therefore declare in ejectment, or institute a suit, in another name, using the name of *Luscombe* on entering on the estate, and obtaining an act of Parliament within three years.

July 18.

The LORD CHANCELLOR.

I am of opinion, that I cannot order a receiver in the present stage of a case which involves so much nicety. On referring to the authorities, I have some doubt whether the legal estate is still in the trustees, at least for any other purpose than for securing the estate to the separate use of the Plaintiff *Mary Hawkins*, formerly *Mary Creed*. On that supposition, if an ejectment were brought, there could be no defence, provided that a forfeiture has occurred. It has been suggested, that any difficulty may be removed by directing a case; but the forfeiture, if any forfeiture has been incurred, affecting the issue, who are infants, I know not how admissions can be made. The question must therefore be decided on the hearing of the cause.

The

The LORD CHANCELLOR.

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If the Defendant has forfeited for himself and his issue, a legal estate must be in the trustees, because they are to hold for the separate use of *Mary Creed*, now *Mary Hawkins.*

Sir *Samuel Romilly.*

The whole legal estate being in the trustees, the Plaintiff cannot proceed at law.

The LORD CHANCELLOR.

Construction in favour of vesting the legal estate in trustees, for effecting a limitation to the separate use of a married woman.

I doubt whether the whole legal estate is in the trustees, if the condition is not broken. In a case in the seventh volume of the Term Reports (*a*), of a devise to trustees and their heirs, with limitations to uses, the Court held, that the legal estate was in the trustees throughout; but, as it seems to me, for this reason, that there being various trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate (*b*), there

(*a*) Probably *Harton* v. *Harton*, 7 *T. R.* 652. "Whether this be a use executed in the trustees or not must depend upon the intention of the devisor, which is to be collected from the will. This provision, it appears, was made in order to secure to the several femes coverts a separate allowance, free from the controul of their husbands; to effectuate which it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object that the devisor had in view." Lord *Kenyon*, p. 653, 654. See *Neville* v. *Saunders*, 1 *Vern.* 415. *South* v. *Alleyne*, 5 *Mod.* 63. 101. 1 *Salk.* 228. *Comb.* 375. *Jones* v. Lord *Say* and *Sele*, 1 *Eq. Ca. Abr.* 383. 8 *Vin. Abr.* 262. 3 *Bro. P. C.* ed. *Toml.* 457.

(*b*) See *Doe* v. *Hicks*, 7 *T. R.* 433.

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there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate, after every trust for a married woman, they would not have held the whole legal estate to have been in the trustees

Sir *Samuel Romilly* observed that, in this case, the words are, to the trustees, "to the use of them and their heirs," which must vest the legal estate in them.

The LORD CHANCELLOR.

An infant is not bound by admissions.

Those words are extremely important. But here is a ferfeiture, if at all, of the estates of the tenant for life, and of his infant children; and how can facts be stated in a case so as to bind infants? (*a*)

The case was not mentioned again. (*b*)

(*a*) See *Eccleston* v. *Petty*, *Carth.* 79. 3 *Mod.* 258. *Comb.* 156. *Leigh* v. *Ward*, 2 *Vent.* 72. *Wrottesley* v. *Bendish*, 3 *P. W.* 237. *Thurston* v. *Nutton*, ibid. n. E. *Legard* v. *Sheffield*, 2 *Atk.* 377. *Copeland* v. *Wheeler*, 4 *Bro. C. C.* 256. *Redesdale on Pleadings*, 254. *Lucas* v. *Lucas*, 13 *Ves.* 274. *Cowdell* v. *Tatlock*, 3 *Ves. & Beam.* 19. *Savage* v. *Carroll*, 1 *Ball & Beatt.* 553. *Cowling* v. *Ely*, 2 *Stark*, 366.

(*b*) An ejectment was afterwards brought, and the Court of King's Bench decided, that *John Luscombe Luscombe* had not incurred a forfeiture. *Doe* v. *Yates*, 5 *Barn. & Ald.* 544.

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Ex parte SMYTH,

In the matter of *Thomas Smyth*, a lunatic.

July 25.

An act of Parliament having authorized the vicar of *C.* to grant leases of the glebe lands, with the consent of the patron in writing, the patron being lunatic, a petition by the committees of his person and estate, for a reference to the Master to inquire whether it would be fit that they, on his behalf, should consent to a lease, was refused.

THE petition of Sir *William Smyth*, Bart., and the Reverend *Edward Smyth*, clerk, committees of the lunatic's estate, stated, that, under a commission in the nature of a writ *de lunatico inquirendo*, dated the 13th of *January* 1816, *Thomas Smyth* had been found a person of unsound mind, and that the custody of the person of the lunatic had been granted to the petitioner Sir *William Smyth*, Bart., and the care and management of his estate to both the petitioners; that, by an act of Parliament made in the 53d year of the reign of *George* the Third, entitled, "An act to enable the vicar of the church of *Camberwell*, in the county of *Surrey*, for the time being, to grant leases of certain parts of the glebe belonging to the said vicarage," it was enacted, that, from and after the passing of the act, it should be lawful for the petitioner *Edward Smyth* and his successors, vicars of the said church, by indenture or indentures sealed and delivered by the vicar of the church for the time being, to demise or lease, with the consent, in writing, of the bishop of the diocese, and the patron of the vicarage, for the time being, all or any parts of the glebe lands described in the schedule to the act, for any term or number of years not exceeding ninety-nine years in possession, unto any person or persons who should be willing to build upon the glebe lands, or to repair or improve the future houses or buildings to be erected thereon, or to erect or build any house or houses or other buildings in lieu and stead thereof, so as there should be reserved by every such lease or demise the best yearly rent that could be reasonably obtained for the premises therein comprised, payable, half-yearly or oftener, to the party making such

lease

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lease or demise, and his successors, and so as every such lease or demise be made without taking any sum, or other thing, by way of fine (except as in the act is excepted); that the petitioner *Edward Smyth* was the vicar of the church of *Camberwell*, and, in pursuance of the act, had agreed with *Henry George* to grant a lease of part of the premises described in the schedule to the act; and that the lunatic was patron of the vicarage.

The petition prayed a reference to the Master, to inquire and certify, whether it would be fit and proper that the petitioners, as committees of the estate of the lunatic, and on his behalf, should consent to a lease to be granted to *H. George*, of part of the premises described in the schedule in the act of Parliament; and also a reference to inquire and certify, from time to time, whether it would be fit and proper that the petitioners, as the committees for the time being of the lunatic's estate, should consent to any lease to be granted in pursuance of the act of Parliament, of all or any parts of the glebe lands described in the schedule thereto.

Sir *Samuel Romilly* for the petition.

The design of the provision in the act was to prevent improvident leases by the vicar: the purpose for which it required the consent of the patron will be sufficiently secured by the consent of the committee, under the sanction of the Court.

The LORD CHANCELLOR.

Unless the act requiring the consent of the patron in writing authorizes the committee to consent for him, I cannot sanction a lease with the consent of the committee.

Order refused.

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Persons who, with the knowledge of the Plaintiff, had entered into a subscription to defray the costs of the suit, having been examined by the Plaintiff, the Defendant, on an application as soon as he obtained a knowledge of that fact, was permitted to exhibit new interrogatories to the witnesses for the purpose of proving it; and a motion by the Plaintiff to discharge that order, or obtain leave for exhibiting new interrogatories, to prove the execution of releases to the former witnesses, and for re-examining the former witnesses on the former interrogatories, was refused, with costs.

THE Plaintiffs, trustees under an act of parliament for building a new church at *Clifton*, entered into a parol agreement with the Defendant for the purchase of land on which the church might be built; the bill prayed specific performance of that agreement; and the only question was, whether the Plaintiffs had undertaken to cause a footpath which crossed the Defendant's grounds to be closed, the Plaintiffs insisting that the Defendant's solicitor abandoned that part of the agreement. The Defendant having filed his answer with despatch, a joint commission was issued for the examination of witnesses. Before publication passed, the Defendant discovered that witnesses examined on behalf of the Plaintiff had entered into a subscription to defray the expenses of the suit, and that *Osborn*, the Plaintiff's principal witness, was the solicitor in the cause, and had agreed to bestow his attendance and personal labour gratuitously, and to advance 100*l*. towards the costs.

On the motion of the Defendant (*a*), the Vice Chancellor, on the 22d of *August* 1817, pronounced the following order: —

"This Court doth order, that the said Defendant be at liberty to exhibit fresh interrogatories for the examination of *J. Osborn* and *T. Whippie*, two of the Plaintiff's witnesses, as to their being interested in the subject-matter of this suit; and it is ordered, that the Plaintiffs be at liberty to cross-examine the said two witnesses, as to the said interrogatories only; and, by consent, it is ordered, that the Defendant be at liberty to take out a new commission, for the purpose aforesaid, directed to the com-

(*a*) 2 *Madd.* 322.

missioners

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missioners named in the former commission; but the said commission is to be at the expense of the Defendant." (*a*)

A motion was now made, on behalf of the Plaintiffs, before the Lord Chancellor, that the order of the 22d of *August* might be discharged, or "that the evidence given in this cause by *J. Osborn* and *T. Whippie*, named in the said order, might be suppressed, and that the Plaintiffs might be at liberty, on the execution of the commission thereby directed, to examine the said *J. Osborn* and *T. Whippie* to the several matters they have been previously examined to in this cause; and for that purpose to exhibit, under the said commission, the first interrogatories exhibited on the part of the Plaintiffs under the former commission, and also to exhibit proper interrogatories to examine other witnesses to prove proper releases and discharges to the said *J. Osborn* and *T. Whippie*, from any thing which might affect their competency as witnesses in this cause."

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On this day Mr. *Leach* and Mr. *Wilbraham* were heard in support of the motion, and Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *C. Romilly* against it.

The Lord Chancellor, remarking that all the ancient forms of interrogatories included a question whether the witness was or not interested in the event of the suit; and that such was the course of proceeding in every court where examination was conducted by written interrogatories; and referring to the practice of purga-

(*a*) Reg. Lib. B. 1816. fol. 1715.

tion

tion in Scottish courts (*a*), postponed judgment till he had read the order and the interrogatories. (*b*)

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The case was again mentioned.

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Mr. *Bell*, Mr. *Wetherell*, and Mr. *Wilbraham*, in support of the motion.

' No precedent can be produced of a re-examination to interest, after the commission has been closed, and the depositions returned. Objections to the competence of a witness are discouraged by the Court, and are therefore not permitted, if the proper opportunity, namely, the time when the witness is offered for examination, has been suffered to pass. It would be extremely dangerous to permit the party to reserve this objection till the effect of the examination is known. According to the ancient practice, by cross-examination to the merits, objections to competence are waived, — a point of familiar occurrence in tithe causes.* If re-examination is allowed at all, it must be to the whole case; and the Court continually allows re-examination to the merits before publication;

(*a*) " All witnesses, before they are examined in the cause are purged of partial counsel, that is, they must depose, that they have no interest in the suit, nor have given advice how to conduct it; that they have got neither bribe nor promise, nor have been instructed how to depose; and that they bear no enmity to either of the parties. These, because they are the first questions put to a witness, are called *initialia testimonii*. Where a party can bring present proof of a witness's partial counsel, in any of the above particulars, he ought to offer it before the witness be sworn; but, because such objection, if it cannot be instantly verified, will be no bar to the examination, law allows the party in that case, to protest for *reprobator*, before the witness is examined; i. e. that he may be afterwards allowed to bring evidence of his enmity, or other inhability." *Erskine*, Principles of the law of *Scotland*, book 4. tit. 2. s. 14.

(*b*) From Mr. *Merivale's* notes.

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cation; as, where depositions are suppressed because the interrogatories were leading (*a*), or the depositions were produced to the commissioners ready prepared — *Shaw* v. *Lindsey* (*b*); so in *Cholmondeley* v. *Clinton* (*c*), the last case on the subject. The effect of the Vice Chancellor's order is to deprive the Plaintiff of the witness's evidence. Should it appear that the witnesses were disqualified by interest at the time of the past examination, the Plaintiff may qualify them by releases, and will then, conformably to the practice at law, be entitled to a re-examination.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *C. Romilly*, against the motion.

The order of the Vice-Chancellor was perfectly of course; it is the daily practice, after witnesses have been examined on interrogatories, to permit the exhibition of new interrogatories before their depositions have been published — *Harrison*'s Practice. (*d*)

Liability to the costs of the suit is clearly an interest which disqualifies — *Phillipps* on Evidence (*e*); and the objection to the competence of the witness is not waved by cross-examination in ignorance of his interest in the suit; it is sufficient to object as soon as knowledge of that fact is obtained — *Needham* v. *Smith* (*f*), *Scott* v. *Fenwick* (*g*), *Perigal* v. *Nicholson* (*h*), *Moorhouse* v. *De Passau*. (*i*) The modern distinction is, that the proper time for examination to *competence* is before publication; but the exhibition of interrogatories to *credit*, is permitted after publication

(*a*) See *Spence* v. *Allen*, *Prec. in Cha.* 493. *Gilb. Rep. in Eq.* 150. Lord *Arundell* v. *Pitt*, *Amb.* 585. *Mentill* v. *Payne*, 3 *Anstr.* 923.

(*b*) 15 *Ves.* 380.

(*c*) 3 *Mer.* 81.

(*d*) P. 273.

(*e*) Ch. 5. sect. 1. p. 60.

(*f*) 2 *Vern.* 463.

(*g*) 3 *Gwill.* 1255.

(*h*) *Wightw.* 64.

(*i*) *Coop.* 300. 19 *Ves.* 433.

—*Cal-*

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— *Callaghan* v. *Rochfort* (*a*), *Purcell* v. *M'Namara* (*b*), *Wood* v. *Hammerton* (*c*), *Carlos* v. *Brook* (*d*), *Mill* v. *Mill* (*e*), *Stokes* v. *M'Kerrall.* (*f*) By the present practice at law, the objection to competence prevails at whatever period of the examination it is discovered — *Phillips* on Evidence. (*g*)

The second object of this application, liberty to re-examine the witnesses after the execution of releases, requires authority. On principle it cannot succeed. The rules of law presume an influence from interest; the evidence given under that influence, could not be altered by the witness after he had received a release. Such a recantation would subject him to infamy at least, if not to other penalties of perjury. The cases of re-examination on the same interrogatories, are confined to instances in which the original examination is defective by reason of some accidental error — *Sandford* v. *Paul* (*h*), *Rowley* v. *Ridley* (*i*), *Kirk* v. *Kirk.* (*k*)

The LORD CHANCELLOR.

Inclination of the Courts to convert objections to competence, into objections to credit.

There is no doubt that, of late years, courts of justice have struggled to convert objections to the competence of a witness into objections to credit (*l*); and recent decisions

(*a*) 3 *Atk.* 643.

(*b*) 8 *Ves.* 324.

(*c*) 9 *Ves.* 145.

(*d*) 10 *Ves.* 49.

(*e*) 12 *Ves.* 406.

(*f*) 3 *Bro. C. C.* 228., and see *Russel* v. *Atkinson*, 2 *Dick.* 532. *Watmore* v. *Dickenson*, 2 *Ves. & Bea.* 267. *White* v. *Fussel*, 19 *Ves.* 127.

(*g*) Cha. 5. sect. 8. p. 130. Cha. 8. p. 267, 268. Compare Lord *Lovat's* trial, 18 *Howell*, State Trials, 596, 597. *Abrahams* v. *Bunn*, 4 *Burr.* 2251. *Turner* v. *Pearte*, 1 *T. R.* 717. *Howell* v. *Lock*, 2 *Campb.* 14.

(*h*) 2 *Dick.* 750. 3 *Bro. C. C.* 370. 1 *Ves.* jun. 398.

(*i*) 1 *Cox.* 281.

(*k*) 8 *Ves.* 280. 285., see *Bott* v. *Birch*, 5 *Madd.* 66.

(*l*) See *Lee Rep. Temp. Hardwicke*, 360. 1 *T. R.* 300. 3 *T. R.* 32.

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Interest to disqualify a witness, must be interest in the event of the cause.

(which, though it is difficult always to understand the grounds, are substantially right), establish this, that if the witness has no interest in the event of that cause, though his answer to the question may be evidence for or against him in another cause, that is not an objection to his competence (*a*); but I have never known that doctrine applied to a case in which a bill has been filed in this Court, and the witnesses have engaged to pay the costs of the proceedings; there, neither the Plaintiff nor the witnesses could be otherwise than aware that they had an interest in the event of that suit.

Presumption that objections to competence have been waved, where it is not clear that at the time of the examination the objection was unknown.

It is said, that the commission having been returned, objections to competence are too late. The party may, indeed, waive the objection to competence; and in a case in which it is not made reasonably clear, that at the date of the examination of the witness, the party had not a knowledge of the objection to competence, I should be inclined to hold that he has waived it; but it is here alleged, that the Defendant was not, at the time of the examination, aware of the incompetence; and in reply to the objection that he comes too late, the Defendant says, the moment it is discovered that a witness has an interest, his evidence is destroyed, and that being destroyed, and to be struck out, how is it to be restored at law or in equity? I know not what is the practice of courts of law. When, after the witness has been cross-examined to the bone, on the last question it appears, that he has an interest in the suit, the judge must say, that no attention could be given to his evidence; but whether they permit a release to be given, and the witness to be asked the general question, " Is all that you

(*a*) The distinction is between an interest in the question, and an interest in the event of the suit; the latter alone disqualifies. 1 *T. R.* 302. 3 *T. R.* 36. 7 *T. R.* 603. *Phillips on Evidence*, cha. 5. sect. 1.

have

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have said to-day true?" or the examination to be repeated, is that of which I am not informed. At a late period of my life, however, I certainly remember no such instance.

It is a novelty to me to hear it said, that if it appears that a witness was interested at the time of the examination, this Court knows any such practice as that, a release being given, the witness may then be re-examined. (*a*) I believe that that never was done in any well considered case. When, with knowledge that there might be an objection to the testimony, and not requiring on the one hand, or giving on the other, a release, the parties take their chance of interested testimony, it would lead to mischief beyond calculation, if they were permitted, should the objection transpire in the progress of the cause, to release and re-examine, when it is almost morally impossible that the witness should be relieved from the influence which previously prevailed in his mind. Such a practice would be still more dangerous in equity than at law, where the witness stands before a tribunal which knows all that he has said, and can sift his evidence. In equity, one deposition will be suppressed and the other divulged. That is, in my opinion, a material objection to suffering these witnesses to be re-examined.

Re-examination of a witness interested at the time of examination, not practised in equity.

Danger of such a practice.

It is nothing to allege that, on an issue, they would be examined: that is the course of the Court; and they might be examined with reference to their depositions here. It is enough to say that practice sanctions that, and I know no practice which sanctions this. Unless I mention it to-morrow, you will consider the motion as refused.

(*a*) *Callow* v. *Mince, Prec. in Cha.* 234. 2 *Vern* 472.

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The LORD CHANCELLOR.

I take this to be a case in which the party who examined the witnesses knew at the time that they had an interest. Without prejudice therefore to the question, in a case where neither the Plaintiff nor the Defendant knew the fact of interest in the witness, my opinion is, that as I can find nothing in this Court analogous to the practice at law of giving a release to a witness to qualify him for re-examination, the party cannot re-examine these witnesses to the merits.

Motion refused with costs. (*a*)

(*a*) On the re-examination before the master, of witnesses examined previously to the decree, see *Smith* v. *Graham*, *ante*, p. 264.

ANN PAXTON GEE, PLAINTIFF,

AND

WILLIAM PRITCHARD, and WILLIAM ANDERSON, - - - DEFENDANTS.

July 17. 28.

Letters written by the Plaintiff to the Defendant, having been returned by him, with a declaration that he did not consider himself entitled to retain them, the publication of copies taken before the return without the knowledge of the Plaintiff, was restrained by injunction, though represented by the Defendant as necessary for the vindication of his character. The jurisdiction to restrain the publication of letters is founded on a right of property in the writer.

THE bill stated, that *William Gee*, late of *Beddington Park*, in the county of *Surrey*, deceased, the late husband of the Plaintiff, for many years before, and at the time of, his death, resided in the mansion of *Beddington Park*; that the Plaintiff had not any issue by

by *William Gee*, and after their marriage *William Gee* informed the Plaintiff, that there was a boy whom he maintained, and intended to educate and bring up, and that he was desirous that the boy should reside at *Beddington* during the vacations from school, and that he intended to educate him and procure him a living in the church, or to place him in some other respectable situation in life; that the Plaintiff having great affection for her husband, and being desirous to comply with his wish in that respect, consented to receive the boy, whose name was *William Pritchard*, (the Defendant, the Rev. *William Pritchard*,) and he was accordingly brought to the house at *Beddington*, and spent his vacations there; that *Pritchard*, after that time, and while he remained at school, was brought to *Beddington*, as his home during the vacations, or times of recess from school, and after he quitted school, and was a student at the University of *Cambridge*, and until his marriage in the year 1810, he was permitted by *William Gee* and the Plaintiff, to return to and reside at *Beddington* as his home; that *William Gee*, by having *Pritchard* frequently at his house on such occasions, had, and showed great fondness for him, until some time before his death, and the Plaintiff also entertained a good opinion of *Pritchard*, and had great regard for him, which she often expressed to him by letters and otherwise, and she at all times paid him great attention, and shewed him great kindness.

The bill further stated, that *William Gee* died in *July* 1815, having first, by his will, divided his property between the Plaintiff and *Pritchard*, and made such provision for *Pritchard* therein as he thought proper and just; that, for many years during the time the Plaintiff was so acquainted with *Pritchard*, she was in the habit of writing letters to, and receiving letters from him, on various family and other subjects, some of them of a

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private and confidential nature, and some as the Plaintiff believes, relating to his morals and conduct in life, and containing advice to him; that for some time past the Plaintiff had had great reason to be displeased and dissatisfied with *Pritchard* and his conduct, and in consequence thereof they had ceased to be on terms of friendship; and *Pritchard*, from resentment, as the Plaintiff believed, had threatened and intended to print and publish copies of the letters which were so written by the Plaintiff to him, or extracts therefrom; and wrote a letter to the Plaintiff, dated the 14th of *May* 1818, containing the following passage: — "My life, as far back as memory serves, more particularly from my first residence at *Beddington*, together with the grounds I had for being differently situated, viz. your professions contained in your letters, will be published in the middle of *June*."

The bill charged that *Pritchard* was proceeding to print and publish, or cause to be printed and published, the letters of the Plaintiff, or true copies or copy thereof, and extracts therefrom, and that he and the Defendant *Anderson* had caused public notice thereof to be given, by advertisement in the newspapers, and otherwise, and particularly in a newspaper called *The Morning Post*, on *Friday* the 9th of *July*, in the words following: "In the press, and speedily will be published, by *William Anderson*, bookseller, *Piccadilly*, 'The Adopted Son, or, Twenty Years at *Beddington*,' containing Memoirs of a Clergyman, written by himself, and interspersed with interesting correspondence;" and that *Anderson* was printing and about to publish the same, or some work in which the letters, or copies thereof, or extracts therefrom, were introduced.

The bill also charged, that the Plaintiff never consent-

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ed or agreed that the letters, or any of them, or any extracts or extract therefrom, should be published; and, in answer to an alleged pretence of the Defendant *Pritchard*, that the letters were his private property, and that he was entitled to print and publish them, or to make such use of them as he might think proper, charged, that the letters were wholly written and composed by the Plaintiff, and were not the property of *Pritchard*, but of the Plaintiff, and that *Pritchard* had not even a joint, or partial, or any property whatever therein, and that *Pritchard*, if he ever had any interest in the letters, had parted with the same, for that he some time since sent to the Plaintiff a parcel of letters and papers, accompanied by a letter from him, stating, that the parcel contained the origina letters which the Plaintiff had so written to him (the parcel of letters being then in the Plaintiff's possession); but the Plaintiff charged, that *Pritchard*, before he sent to the Plaintiff the parcel of original letters, and without the consent of the Plaintiff, took, or caused to be taken, a copy thereof, from which copy so taken he intended to print and publish copies or extracts.

The bill further charged, that the Defendants were, or were to be, jointly interested in the profits, if any, which should be made or produced by the sale of the publication, or that *Anderson* had, or was to have, some joint interest or concern with *Pritchard* in the publishing and sale of the letters or work; that the publication of the letters, by the Defendant, was a breach of private confidence, or violation of the right and interest of the Plaintiff therein, and was intended to wound her feelings, and could have no other effect.

The bill prayed, that the Defendants might be respectively restrained by injunction from printing or publishing the original letters, or any copies or copy of the original letters, so written by the Plaintiff, or any extracts

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tracts or extract therefrom, and might be decreed to deliver up to the Plaintiff, or to destroy, the original copy of the letters so taken or made by the Defendant *Pritchard*, and all printed and other copies thereof, or of any extracts therefrom, which they might respectively have in their possession or power.

The allegations of the bill being verified by affidavit, a motion was made for an injunction, which the Lord Chancellor, after inquiring for an instance of an injunction issued against the person to whom the letters were addressed, granted on the authority of *Thompson* v. *Stanhope*. (a)

"It was therefore prayed, that the Defendants may be respectively restrained, by the order or injunction of this Court, from printing or publishing the said original letters, or copies or copy of the original letters written by the Plaintiff, or extracts or extract; which, upon hearing, *&c.*, is ordered accordingly, until the Defendants shall appear to, and fully answer, the Plaintiff's bill, or this Court make other order to the contrary."

Reg. Lib. A. 1817, fol. 1819.

July 28.

On this day a motion was made, on behalf of the Defendant, to dissolve the injunction.

The affidavit of the Defendant, in support of the motion, stated, that he was the natural son of *William Gee*, the late husband of the Plaintiff, and that about nineteen years ago, and when he was of the age of eleven years, he was, with the consent of the Plaintiff, and with her knowledge of the relationship between himself and Mr.

(a) *Amb.* 737.

Gee,

Gee, taken into Mr. *Gee*'s house, and from that time till Mr. *Gee*'s decease, was uniformly treated by him as his son, and was placed by him, and at his expense, under the tuition of a clergyman, who lived a few miles from *Beddington* Park, and during his vacations he went to, and resided at *Beddington* Park, as his proper home; that in the year 1806 he was sent by Mr. *Gee* to St. *John*'s College, *Cambridge*, where he was, by Mr. *Gee*'s direction, entered at first as a pensioner, and afterwards as a fellow commoner; and that during the whole time, from the period at which he was so received into Mr. *Gee*'s house, until the time of his death, he was uniformly treated by Mr. *Gee* as his son, and with the greatest kindness and indulgence, and was introduced by him into the society in which Mr. *Gee* lived, which was of the first rank in the neighbourhood of his residence, and was always given to understand by Mr. *Gee*, that he was to be provided for by him, as if he had been his son by marriage, and therefore the Defendant conceived he should succeed to the bulk, or a large portion of his property, and that, in forming his acquaintance and connexion in the world, he was to act as having such expectations; that from the time when he was so taken into the house of Mr. *Gee*, until Mr. *Gee*'s death, he was always treated and regarded by the Plaintiff as her adopted son, and she, during the whole of that time, declared the greatest love, and regard, and esteem for him, and wrote to him, and also to his wife, previous to and subsequent to their marriage, a great number of letters expressive of such sentiments, and the Defendant, at her invitation, always treated her as his mother, and called her by that name.

The affidavit further stated, that in the year 1815 Mr. *Gee* died, having, by his will, made some provision for the Defendant during the life of the Plaintiff, and having bequeathed the sum of 17,000*l.* to the Defendant, or his family,

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family, after the Plaintiff's death, provided she did not, by any deed or will, otherwise dispose thereof; that the provision made by the will, independent of the sum of 17,000*l.*, was very inadequate to the expectation Mr. *Gee* had held out to the Defendant; but that he was perfectly certain, that in making such inadequate provision, and also in making the bequest of 17,000*l.* to the Defendant or his family, subject to alteration by the Plaintiff, Mr. *Gee* was fully persuaded, from the affectionate conduct and great regard exhibited by the Plaintiff to the Defendant, that the Defendant might safely depend for his future support on her affection; and that Mr. *Gee* wished to put it in the Plaintiff's power to evince, by something more than words, her affection and regard to the Defendant; that immediately after the decease of Mr. *Gee*, a great alteration took place in the conduct and deportment of the Plaintiff to the Defendant; and it was, by the direction of the Plaintiff, suggested to the Defendant within a few days after Mr. *Gee*'s death, that the Defendant was no longer to call her by the name of mother, as circumstances were altered; and that she had for some time not only withdrawn her regard from the Defendant, but treated him with great contumely, and expressed herself concerning him in the most injurious and opprobrious terms; that the Defendant having, as well during the life of Mr. *Gee*, as since his decease, entertained such expectations as were authorized by the conduct and expressions of Mr. *Gee*, and of the Plaintiff herself, and having, in his intercourse with his neighbours and acquaintance, conducted himself as having such expectations, and having in his conversation occasionally alluded to the same, and especially having, upon his marriage, represented to his wife and her parents, that he had such expectations, the Plaintiff had, as the Defendant had been informed and believed, stated or represent-

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ed, that neither herself nor Mr. *Gee* ever gave the Defendant any reason to entertain any such expectations, and that, therefore, the Defendant's representations in that repect were wholly without foundation, or to that effect; from which circumstance, and from the great influence with which the large property of the Plaintiff, in the country, and her great character invested her, doubts had been entertained of the Defendant's veracity in such his representations; that he had never committed any act to forfeit the regard and esteem of the Plaintiff, nor was there any thing in his moral or prudential conduct, or in his conduct to the Plaintiff, that could justify her withdrawing her regard and esteem from him, and treating him in the injurious manner above-mentioned; but notwithstanding, the Defendant found, that from the alteration in the behaviour of the Plaintiff towards him, reports and suspicions had prevailed in his neighbourhood, that the Defendant had been guilty of some gross act or acts of misconduct, or that he had acted without due deference to the Plaintiff, or Mr. *Gee*, and especially, that the Defendant's marriage was contrary to their wishes; whereas both the Plaintiff and Mr. *Gee*, at and long previously to the time when the Defendant's marriage took place, approved thereof, in the most unqualified terms.

The affidavit proceeded to state, that the Defendant was the rector of *Walton on the Hill*, and many of his parishioners were tenants of the Plaintiff; and from the alteration in the Plaintiff's behaviour to the Defendant, he found himself greatly hurt and lowered in the estimation of his parishioners, and felt it absolutely necessary to lay a statement of the circumstances of his case and conduct before the public, which, supported by the letters of the Plaintiff as necessary documents to authenticate the statement, he conceived to be the only means of vindicating

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vindicating his character and conduct to his parishioners and acquaintance, and the noblemen and gentlemen with whom he had been in the habit of associating; and he accordingly had written and prepared such a statement, under the title mentioned in the bill, which, with the permission of the Court, he intended to publish and distribute gratuitously, among his acquaintances and neighbours, but which he never intended should be sold, nor had he the least view to gain a profit on such publication; that he had therein no vindictive object nor motive of resentment, nor any wish to lay open or publish to the world any of the Plaintiff's secrets, or to wound her feelings, or to compel or induce her to comply with any applications made to her by the Defendant, nor any other object than the Defendant's own vindication; that the letters, and parts of letters, which he intended to publish, related solely to the Defendant and his wife, as connected with the Plaintiff and Mr. *Gee*; and that several of the facts before stated he could have supported, by inserting some of the Plaintiff's letters; but, in deference to the decision of the Court in granting the injunction, he had forborne so to do.

The farther affidavit of the Plaintiff, in opposition to the motion, stated, that *William Gee*, the late husband of the Plaintiff, and the reputed father of the Defendant *Pritchard*, by his will, among other things, gave to *Pritchard* the sum of 4,000*l*., which he had received, and also, during his life, the interest of the sum of 6,000*l*., (which he had also received from time to time,) and after the Defendant's death he gave the 6,000*l*. for the benefit of the wife and children of the Defendant; and he also gave the sum of 17,000*l*. to trustees, in trust, to pay the interest to the Plaintiff for her life, and after her death, to pay the principal to such persons, and in such manner as she should appoint; and if she made no appointment, then,

then, upon trust, to pay out of the dividends thereof an annuity of 100*l.* to *H. S.* for her life, and subject thereto to pay the dividends to *Pritchard*, and after his death for the benefit of his wife and children.

The affidavit of the Plaintiff further stated, that she considered the provision so made by the will of Mr. *Gee*, compared with his fortune, an adequate provision for the Defendant, and as much as the Defendant had, or as Mr. *Gee* gave him, any reason to expect; that she believed the reason why Mr. *Gee* gave to her a power of disposing of the sum of 17,000*l.* after her decease, was to give her a check upon his conduct, and to enable her to withhold all benefit thereof from the Defendant, if, by his conduct, he should not, in her opinion, entitle himself to the same, and that such power was not given to her to evince, by more than words, her regard to *Pritchard*; that *Pritchard* was never given to understand from her that he had reason to expect Mr. *Gee*'s fortune, and that, in a letter written by him to her, so late as the 16th of *February*, he admitted the same; she denied that she had treated *Pritchard* with great contumely, or that she had expressed herself in any injurious and opprobrious terms concerning him; but she said, that having great reason to be displeased and dissatisfied with his conduct, she had expressed such her displeasure and dissatisfaction.

The affidavit proceeded to state, that since the death of Mr. *Gee*, the Plaintiff procured for the Defendant the presentation to the rectory of *Walton on the Hill*, of the annual value of about 400*l.*, of which he was then in possession as incumbent; and she had also, on his representation of having incumbered himself with debt, given to him the sum of 4,500*l.* to enable him to pay his debts, and had since given to him other large sums of money; that

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that *Pritchard* still continued to apply to her for money, and pressed her to allow him to receive the interest of the sum of 17,000*l.*, and to give up to him her life interest therein, with which she refused to comply.

The affidavit expressed her belief, that *Pritchard* had been induced to threaten to publish the letters which she had written to him, for the purpose of compelling or inducing her to comply with such application, and not of vindicating his character and conduct; that, on the 18th of *March*, she received a letter from him, addressed to her, whereby he expressed himself, amongst other things, as follows: — "I allude to the interest of the 17,000*l.*, which, if you will allow me, without further comment, to receive the interest of, at *S. W*'s., I shall give you no further uneasiness, either by my presence or by further application;" that the letter mentioned in the bill to have been written by *Pritchard*, and sent to her with the original letters which she had formerly written to him, was dated the 6th of *April* then last; and therein, after accusing himself of ingratitude to the Plaintiff, and apologizing to her for his past conduct, he begged her forgiveness, and disclaimed or abandoned all right to the letters, as being unworthy of the sentiments and expressions of kindness contained in them.

Mr. *Hart*, Mr. *Wetherell*, and Mr. *Sidebottom*, in support of the motion.

This injunction cannot be supported, except on the general principle, that the writer of a letter is entitled at any time to restrain the publication, and to recover the possession from the person to whom it was addressed. No such principle has ever been recognized in the jurisprudence of this country, and is negatived by the only

recent

recent decision on this subject, Lord and Lady *Perceval* v. *Phipps*. (*a*) In *Hudson's* Treatise on the Court of Star Chamber (*b*), no trace is found of any interference of that tribunal, by injunction or otherwise, on the subject of letters, unless the publication was libellous.

The LORD CHANCELLOR.

It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes; excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime — an exception arising from that peculiar jurisdiction of this Court.

The Court of Chancery has no jurisdiction to prevent crimes, except in the protection of infants.

Argument in support of the motion resumed.

An attempt will be made to sustain the injunction, on the ground that the publication of the letters will be painful to the feelings of the Plaintiff.

The LORD CHANCELLOR.

I will relieve you also from that argument. The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court.

No injunction to restrain the publication of letters as painful to the feelings of the writer.

Argument in support of the motion resumed.

The injunction then must rest on one of two grounds:

(*a*) 2 *Ves. & Beam.* 19.

(*b*) 2 *Collect. Jurid.* 1. — 239.

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1. That the Plaintiff possesses, in the letters, a property either general or literary; 2. That the publication of them is a breach of trust.

It will be difficult to establish that letters may be the subject of literary property. The cases of *Pope* v. *Curl* (*a*), and *Thompson* v. *Stanhope* (*b*), render it doubtful to what extent the Court recognizes the doctrine of property in letters. Thus *Pliny's* letters are said to have been written or revised for publication. (*c*)

The LORD CHANCELLOR.

My predecessors did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt in all these cases is this: If I had written a letter on the subject of an individual, for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord *Hardwicke* and Lord *Apsley*. The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot. (*d*)

The doctrines of Courts of Equity ought to be settled and uniform, founded on fixed principles applicable according to the circumstances of each case. Authority of precedent in equity.

(*a*) 2 *Atk.* 342.

(*b*) *Amb.* 737.

(*c*) *Plin. Epist. l.* 1. *ep.* 1.

(*d*) " Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is

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I understand the Vice Chancellor, in the case of Lord and Lady *Perceval* v. *Phipps* (*a*), not to have denied Lady *Perceval*'s property in the letters, but to have inferred, from the circumstances, that she had authorized, and for that reason could not complain of, the publication.

Argument in support of the motion resumed.

Letters between public functionaries on public business, or between private individuals on private business, where the nature of the subject discussed made it evident that the correspondence could not be designed for publication, may constitute an exception.

The LORD CHANCELLOR.

Are the cases which establish the jurisdiction founded in a right to restore the property, or to restrain the publication? I think that the decisions represent the property as qualified in some respects; that by sending the letter, the writer had given, for the purpose of reading, and, in some cases, of keeping it, a property to the person to whom the letter was addressed, yet, that the gift was so restrained, that *ultra* the purposes for which the letter was sent, the property was in the sender. If that is the principle, it is immaterial whether the publication is for the purpose of profit or not. If for profit, the party is then selling, if not for profit, he is giving, that, a portion of which belongs to the writer. I doubt

The publication of letters may be restrained although not designed for profit.

(*a*) 2 *Ves. & Beam.* 19.

larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience." *Selden*, Table Talk.

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Whether the Court will decree the restoration of letters. *Quære?*

whether the Court has proceeded so far as to decree the restoration of letters; for the principle on which it interferes recognizes a joint property in the writer and the person to whom they are addressed.

Argument in support of the motion resumed.

It is clear that the Defendant was entitled to retain the letters, and retaining, to read and show them to his friends or to strangers. These modes of publication there is no pretence for restraining: upon what principle then can the publication by printing be restrained? An equity, or *jus proprietatis*, in the Plaintiff, must apply equally to every mode of publication, and, confessedly, not authorising the restraint of some modes, cannot by any rational distinction authorise the restraint of any mode. The argument is the same, whether the supposed right of the Plaintiff is founded in property or breach of confidence.

The LORD CHANCELLOR.

Extent of the injunction against publication.

Does the common injunction ever go so far? When the Court enjoins a Defendant from publishing the book of another, has it ever restrained him from reading it, or showing it to his friends? Such an injunction will not prevent the Defendant from carrying the book to a reading-room, or reciting it in public company (*a*); but is that a reason for not restraining publication? The usage limits the extent of the jurisdiction.

Argument in support of the motion resumed.

Admitting that the right of property in the person receiving

(*a*) Acting a dramatic composition on the stage, is not a publication, within stat. 8 *Ann.* c. 19.; but injunctions have been granted to restrain acting as an invasion of copyright. *Morris v. Kelly,* 1 *Jac. & Walk.* 481

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ceiving the letter is qualified, the question whether that right of property includes a right of publication must depend on the circumstances of each case. Whenever the writer is entitled to the restoration of the letter, the party from whom he is entitled to recover it can have no right of publication. The exclusive property in the manuscript includes every right of using it, and, among other uses, for the purpose of publication. But where the correspondent is entitled to retain the mauuscript, great difficulty occurs in restricting his right of publication.

In this case the Defendant was unquestionably entitled to retain the letters; and he is now entitled to publish them for the vindication of his character. The cases of *Pope* v. *Curl*, and *Thompson* v. *Stanhope*, proceed, on the supposition, that the person in possession of the letters was the depositary only, and not the proprietor; but whenever the person to whom they are sent is entitled to retain them, being proprietor of the substance on which they are written, he is proprietor of their contents, and may therefore publish them. The injunction in —— v. *Eaton* (*a*) was granted on the fact of purchase of the letters by the writer from the Defendant.

On the ground of breach of trust, of which there is no evidence, the injunction could not be maintained; this Court interferes with publications only as the subject of property — *Southey* v. *Sherwood*. (*b*) The injunction in the Earl of *Granard* v. *Dunkin* (*c*) was founded on a right of property in the receiver of the letters.

The Lord Chancellor.

The question is, what is the conduct of the Plaintiff,

(*a*) 13 *April*, 1813. 2 *Ves. & Beam.* 23, 27.

(*b*) 2 *Mer.* 435.

(*c*) 1 *Ball. & Beat.* 207.

which,

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which, by the Defendant's affidavit, is represented as his justification in the publication of the letters? If the Court possesses jurisdiction by reason of a right of property, and if the principle of the decision in Lord and Lady *Perceval* v. *Phipps* would require me to declare, that, notwithstanding that right of property, the Plaintiff's conduct had been such, that she was not entitled to the interference of the Court, the Defendant is at liberty to insist on either or both of those points; provided that he is not concluded by the act which Lord *Apsley* so strongly censured, of returning the originals and retaining copies. That act is particularly stated in the bill as an abandonment of property. If the Defendant had any right of property, it was in the originals. He has not averred that the letters will prove the statement in his affidavit, though that is to be inferred. The Defendant might destroy the letters (*a*), and so destroy the Plaintiff's expectation of profit from them.

The person receiving letters may destroy them

Sir *Samuel Romilly* and Mr. *Roupell* for the injunction.

It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication. (*b*)

(*a*) See 3 *Wooddeson* Lectures, 415.

(*b*) " At etiam literas quas me sibi misisse diceret, recitavit, homo et humanitatis expers, et vitæ communis ignarus. Quis enim unquam, qui paululùm modo bonorum consuetudinem nosset, literas ad se ab amico missas, offensione aliqua interposita, in medium protulit, palàmque recitavit? Quid ést aliud tollere à vita vitæ societatem, quam tollere amicorum colloquia absentium? Quàm multa joca solent esse in epistolis, quæ prolata si sint, inepta esse videantur? Quam multa seria, neque tamen ullo modo divulganda?" *Cic. Phil.* ii.

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It is not necessary that they should be written for profit: Dr. *Paley* having prepared sermons designed for gratuitous distribution among his parishioners, the Court held that his executors possessed a property in them, and, at their instance, interfered to restrain the publication by a bookseller. The question here is, whether the Defendant has established that he is about to publish these letters for purposes essential to justice? Without that proof he cannot avail himself of the decision in Lord and Lady *Perceval* v. *Phipps*, a decision which admits much remark. No such case is established by his affidavit, and for the purpose of establishing one, a course more effectual than any affidavit would have been the production of the intended publication. The publication, not of a simple narrative of facts, but of a novel, is an extraordinary expedient for the vindication of character.

The LORD CHANCELLOR.

The decision of the Vice Chancellor proceeded on the principle, that in that case the publication was necessary for the purposes of justice; the letter of the Defendant, written in *April*, is decisive, that the publication here is not necessary for those purposes. What occasion was there for the Defendant to inform the public, that he intended certain papers for distribution among his private friends?

Argument for the injunction resumed.

The present decision will constitute a most important precedent. If, on these affidavits, the injunction is dissolved, no man can be restrained from publishing the letters which he has received from another; all that will be necessary to authorize the publication, is a quarrel, and an assertion, that the disclosure is required for the vindication of his character. When the Defendant re-

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turned the originals, clandestinely retaining copies, he abandoned all right of property in the letters.

The LORD CHANCELLOR.

This case came originally before me on a motion made *ex parte* by the Plaintiff Mrs. *Gee*, the widow of the father of the Defendant, who is represented in the pleadings as his illegitimate son. The affidavit of the Defendant states his introduction in that character; that he was known and received as a son, and treated by his father and his wife with great kindness; the affidavit seems to intimate some dissatisfaction with the representation made in the bill, of the circumstances of his introduction; that is, perhaps, not very material, not a matter which much blends itself with the consideration that I must give to the subject: but his introduction is certainly represented differently in the bill and in his affidavit. It is stated, that the Plaintiff entertained a great kindness for him, and that she expressed that kindness by letters in the life of his father. I collect from the last affidavit, that Mr. *Gee* gave to the Defendant a legacy of 4000*l.*; the interest, for life, of 6000*l.*, devoting the principal of that sum for the benefit of his children; and that he gave to the Plaintiff the interest of 17,000*l.* for her life, with a power, which, under the circumstances, appears to me not unfit, to appoint that sum, not by deed merely, but by deed or will; and I am bound to take it to be his pleasure, that she should have the power, during the whole course of her life, of judging to whom, at her death, it should devolve; an absolute power, of the exercise of which no person has any right to complain. The testator also declares, that if his widow does not think proper to make a different disposition, that sum shall go to the Defendant; but as, between the Defendant and the Plaintiff, the rule by which I am governed,

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is the will of his father. I understand that it was the intention, that he should have the living which he now has, which was in the gift of Mr. *Gee's* brother, but not vacant at his death: the Plaintiff contends, that she in some sense obtained it for him; it is not going far to conjecture, that if she had opposed, it would not have been given to him. The Defendant had thus received 4000*l.* from his father's bounty, and the interest of 6000*l.*, and had this contingent right in 17,000*l.*, with the prospect of the rectory.

The Plaintiff represents, that during many years she had addressed to the Defendant letters of a private and confidential nature; that she afterwards had reason to be dissatisfied with his conduct, and they had ceased to be on terms of friendship; and as evidence of his intention to publish the letters, her affidavit states the advertisement. The Defendant represents, that he neither did nor does intend to publish the letters for profit; and insists, that it is too hard a criticism to infer from the words, "to publish," after this explanation, that he must be understood to mean publication for sale; and yet I cannot but think, that the Defendant will, on reflection, admit, that if it was his intention merely to give these letters to his friends and relations, it was not prudent to announce his intention by advertisement. The advertisement thus held out to the public, though of a publication intended only for private circulation, has this effect, that those who see the publication know its nature, but those who saw only the advertisement, might have been led to believe, that there was something in the letters more to the disadvantage of those concerned, than they really contained; and I cannot think this a prudent course.

It has been said, that the bill contains no allegation of a right of property: but there is an express charge, that by

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by returning the originals, the Defendant *Pritchard* abandoned any right of property which he might have had in the letters. The Defendant *Anderson* has not filed any answer or affidavit; but I am bound, by the affidavit of the Defendant *Pritchard*, to believe, that he did not intend to publish the letters for sale.

With reference to charges of wounding feelings, looking at the jurisdiction of the Court to be, if not entirely, mainly, relative to the question, whether the Plaintiff has or has not, property, I shall trouble myself no farther than by simply stating the circumstances of the case as they appear in the affidavits: if they prove a breach of trust, a violation of a pledge which has been given to the Plaintiff, concerning these letters, that is not the ground on which I profess to proceed; but it is necessary to refer to this for the purpose of pointing out the extreme difference between this case and the case of Lord and Lady *Perceval* v. *Phipps*.

The principle of the equitable jurisdiction to restrain the publication of letters doubted.

The argument of Mr. *Wetherell* has confirmed doubts which have often passed in my mind relative to the jurisdiction of this Court over the publication of letters; but I profess this principle, that if I find doctrines settled for forty years together, I will not unsettle them. I have the opinion of Lord *Hardwicke* and of Lord *Apsley*, pronounced in cases of this nature, which I am unable to distinguish from the present. Those opinions have been acquiesced in without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I may entertain, I will lend it only when the parties bring them into question before the House of Lords.

The statement of the Defendant's affidavit I take to be true, as I must have taken his answer. I cannot trust myself with any such question, as whether Mr, *Gee* should have

have left to him a larger fortune; what were the expectations that he might form in consequence of what passed between him and his father, is a point on which I cannot enter. The provision made by the will is that which this Court is bound to say, as between the father and the son, must be considered proper. The Defendant may most honestly entertain an opinion that more was intended; but when I see such a power given to the widow, I must understand that his father meant that, to the time of her death, her will should be free.

Supposing the affidavit of the Defendant to have stated, with a great deal more precision, the representations which seem to him to call in question his veracity, and in consequence of which he is under a belief that it becomes him to set himself right in the opinion of the world, the Plaintiff's representations, that the Defendant's marriage was disapproved by herself and her husband, and so as to all the rest; it would have been a more welcome duty to have considered, first, Whether the Court has jurisdiction on this subject; secondly, Whether the motives which the Defendant states to have led to this publication were so created by the Plaintiff's conduct, that I ought to follow the example of the Vice Chancellor in Lord and Lady *Perceval* v. *Phipps*, and to say, that, let it be ever so clear that the Plaintiff has either a sole or a joint property in the letters, the Court will not interfere between the parties; but the affidavits state a transaction with regard to the letters, with no part of which am I acquainted, except what appears in the affidavits. Repeating that the testator had left 17,000*l.* to the discretion of the Plaintiff, that she had given to the Defendant 4000*l.* since the testator's death, and had, at least in her own judgment, been instrumental in obtaining the living which he now holds, her affidavit, asserting her husband's intention to intrust to her a con-

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troul on the Defendant's conduct, (and I take the facts to be, that she had given to him various sums, and that he continued to press for money,) proceeds to state, that the Defendant returned her letters, having first taken copies, and now threatens to publish them. Whether that is an act which, if it can be done, ought to be done, the Defendant is to decide. I am to decide whether it can be done. If it is supposed, that by reading the letters any impression may be made on my mind different from that which I am about to state, I will forbear to state it, till I have read them; otherwise I am now ready to proceed.

The counsel for the Defendant intimated, that they had read one of the letters and thought it unimportant.

The Lord Chancellor.

I am of opinion, that the Plaintiff has a sufficient property in the original letters to authorise an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. *Wetherell* has urged with so much ingenuity, I say only that though a letter is a subject of property, capable of being much more largely dealt with, in communication, than books, as, by reading to others, repeating passages, *&c.*, yet the Court has never been alarmed out of the practice of granting injunctions relative to letters to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them: it is not deterred from giving that relief because it cannot give other relief more effectual.

In stating what Lord *Hardwicke* says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of

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the Court. In *Pope* v. *Curl*, Lord *Hardwicke* went out of his way to state what he thought the doctrine on the subject of letters. Though the letters of eminent men, no one can suppose that they were all meant for publication; there are many passages in *Swift's* letters which he would be unwilling to have published. Lord *Hardwicke* says, "Another objection has been made by the Defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver: possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world." If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds, "for, at most, the receiver has only a joint property with the writer." (*a*)

No one can read the case of *Thompson* v. *Stanhope* without seeing that this was understood at that time to be the doctrine of the Court. Publication was there advertised in *November*, and the application to the Court not made till *March*, and on that circumstance Lord *Apsley* proceeded in recommending the arrangement which he afterwards mentions: "The executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had applied earlier, before the expense of printing was incurred." (*b*) That is a strong part of the case. Those were letters of two classes, written by a father to his son; one class relating to the characters of individuals. The communication being made by letter is *prima facie* evidence, that that is all the communication which, on the subject of those characters, the writer intends to make. So of what

Qualifications incident to communications made by letter.

(*a*) 2 *Atk.* 342.

(*b*) *Amb.* 739, 740

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relates to education: though they concern public characters, and a public subject — education, no one can maintain, that those discussions found in private letters gave to the person who received the letters a right to carry into public the opinions of the writer on those public characters, and the system of education. Lord *Apsley* therefore granted the injunction, observing, that the Defendant "did very ill in keeping copies of the characters, when Lord *Chesterfield* meant that they should be destroyed and forgotten." Lord *Apsley* also cites the case of Mr. *Forrester* (*a*), which certainly does not apply to letters. I believe the parties came to a compromise.

The doctrine is thus laid down, following the principle of Lord *Hardwicke*: I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

Such is my opinion; and it is not shaken by the case of Lord and Lady *Perceval* v. *Phipps*. I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters; and I think that it will be extremely difficult to say where that distinction is to be found between pri-

(*a*) "In the case of Mr. *Forrester* v. *Waller*, 13 *June* 1741, an injunction for printing the Plaintiff's notes, gotten surreptitiously without his consent, was granted." 4 *Burr.* 2331. In *Donaldson* v. *Beckett*, 2 *Bro. P. C. Ed. Toml.* 129., is enumerated among other "injunctions for printing unpublished MSS. without licence from the author, 13 *June* 1741. *Forrester* v. *Waller*, for Forrester's Reports." Id. 138.

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vate letters of one nature, and private letters of another nature. For the purposes of public justice publicly administered, according to the established institutions of the country, the letters must always be produced; I do not say that of justice administered by private hands; nor do I say that there may not be a case, such as the Vice Chancellor thought the case before him, where the acts of the parties supply reasons for not interfering: but that differs most materially from this case. In *April* last, the Defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord *Hardwicke* says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return. Now I say, that, if in the case before the Vice Chancellor, Lady *Perceval* had given to *Phipps* a right to publish her letters, this case is the converse of that; and that the Defendant, if he previously had it, has renounced the right of publication.

The acts of the parties may supply reasons for not restraining the publication of letters.

On these grounds the injunction must be continued. (*a*)

Motion refused.

(*a*) The following case is extracted from Mr. *Merivale's* MSS.

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CHARLES WHITTINGHAM, JOHN ARLESS, and JOHN POOLE, - - PLAINTIFFS.

THOMAS JONATHAN WOOLER and JOHN WELLS, DEFENDANTS.

Dec. 4. 8.

The Defendant having in two numbers of a periodical work of theatrical criticism, inserted detached extracts, to the extent of six or seven pages, from a farce the property of the Plaintiffs, containing 40 pages, interspersed with criticisms, a bill for a perpetual injunction, and an account of the profits of the numbers, which amounted not to 3*l.*, was dismissed with costs.

The bill stated, that *Poole* composed, and was the author, and sole proprietor, of a farce called, "Who's Who; or, The Double Imposture," the copy-right of which, on the 26th of *November* 1815, he sold to *Whittingham* and *Arless* for fourteen years, (no formal assignment being executed, but the purchase-money being paid,) and which, on the 30th of *November*, was published and sold by them, having been entered at Stationers' Hall. That the Defendants, printers and publishers in partnership, published a periodical work called *The Stage;* in numbers XIII. and XIV. of which they inserted considerable portions of the farce, and threatened to publish the rest without license; and that they sold many numbers, and had others in their possession ready for publication. The bill prayed an injunction against printing, selling, or publishing any other numbers, &c., or any work containing the whole, or any part of the farce; an account of the several numbers of XIII. and XIV. which have been sold, and the expenses attending the same, and the several sums received by the Defendants in respect of such sales, and payment of what was due on the balance, waving penalties. On the 13th of *December* 1815, the following injunction was granted by the Vice Chancellor, on motion supported by affidavit: "This Court doth order, that an injunction be awarded against the said Defendants *T. J. Wooler* and *J. Wells*, to restrain them, and their respective servants, agents, and workmen, from printing, publishing, selling, or causing to be printed, published, or sold, any numbers or number, copies or copy, of numbers XIII. and XIV. of volume III. of the said work or publication, called *The Stage;* and also from selling, or causing to be sold, and from printing and publishing, or causing to be printed, published, or sold, any other numbers or number of the said work, or any work or publication containing copies, or the substance, of the whole, or any part or parts of the said

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said farce, called "Who's Who, or The Double Imposture," without the consent of the said Plaintiffs *C. W.* and *J. A.*, until the said Defendants *T. J. W.* and *J. W.* shall fully answer the Plaintiffs' bill, or this Court make other order to the contrary.

Reg. Lib. B. 1815, fol. 104.

The answer of *Wooler* denied partnership with *Wells;* admitted publication, without licence, of divers parts of the farce, with some differences not merely colourable, but required for the purposes of criticism; admitted sale of 160 copies, and 40 remaining unsold, when, being served with the injunction, he desisted from selling; the receipts of the sale amounting to 2*l.* 16*s.* 8*d.*, and the expenses being equal to the profits; stated, that *The Stage* was a periodical publication, appearing in numbers twice a-week, at threepence a number; a critical work, partaking of the nature of a review and magazine, the object being to communicate theatrical information, announce plays for representation, criticise performances, review the pieces, and introduce leading scenes to notice; and that, for the purpose of illustrating his remarks, it had been the custom of the Defendant to introduce the whole, or parts, of the pieces commented; that, in Number X. an outline, or plot of the piece, was given; in Numbers XI. and XII. no notice taken of it; but in Number XIII., the Defendant being desirous of illustrating his remarks, introduced a small part of the third scene of act I., with a few slight unintentional alterations, and other small parts, with considerable intervals. The answer submitted, that the extracts were not designed, nor calculated, to injure the sale of the original work, which consisted of forty pages; the extracts occupying six or seven; being disjointed, not continuous.

The bill having been dismissed against *Wells*, on the motion of the Plaintiffs, on this day the cause was heard at the Rolls.

Dec. 4.

Mr. *Hart*, Mr. *Bell*, and Mr. *Horne*, for the Plaintiffs, insisted that they were entitled to a perpetual injunction and an account, citing *Macklin* v. *Richardson*. (*a*)

(*a*) *Amb.* 694.

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The Defendant, who argued his own case, cited *Dodsley* v. *Kinnersley*. (*a*)

The MASTER *of the* ROLLS. I will myself compare the two works, in order to avoid the expense of a reference to the Master.

Dec. 8.

The MASTER *of the* ROLLS. The first thing to be noticed in this case is the circumstance that a cause of such a nature should have been brought at all to a hearing, as to which no instance of the sort can be now recollected to have ever before occurred. (*b*) In the case of *Miller* v. *Taylor* (*c*), where every question relating to matters of copy-right was fully canvassed and investigated, Mr. Justice *Willes* is stated to have remarked, that for sixty years before that time there had not been more than two or three causes of this description brought to a hearing; and the reason of this he states to be, that if the injunction is acquiesced in, it is seldom worth the Plaintiff's while to go on for the account. (*d*) In the present case, the Defendant has never tried to get rid of the injunction which had been already obtained; and yet it is thought of importance enough to bring the whole cause to a hearing. Of what moment it can be I am wholly at a loss to conceive. To perpetuate the injunction which has been obtained against the sale of these two threepenny numbers, is the first great purpose for which it is thought so indispensably necessary to call for this solemn interference of the Court. The other purpose, one of kindred importance, is to have an account of the profits arising from the sale, amounting, as sworn by the answer, to the sum of 2*l.* 16*s.* 8*d.* Now, suppose the Plaintiffs were entitled to the whole, and not merely to a proportional part, of these profits, the amount is much below the sum for which this Court entertains jurisdiction.

With regard to the injunction that has been granted, I should think it of course to have granted it upon the original

(*a*) *Amb* 403.

(*b*) *Manley v. Owen,* 8th *April* 1755, 4 *Burr*. 2329., was brought to a hearing, and a perpetual injunction decreed. 13 *Ves*. 502. The case of *Gay's* works, in 1737, is mentioned as one in which the injunction was made perpetual. 1 *Bl*. 505. And in *Dodsley* v. *Kinnersley*, *Amb*. 403. the cause was heard, and the bill dismissed.

(*c*) 4 *Burr*. 2303. 2417.

(*d*) *Ibid*. 2324.

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ginal application; for it was sworn that the Plaintiff's work had been inserted in that publication. But the Defendant has since given an explanation which alters the case. He says, that the publication is in the nature of a magazine or review, consisting of criticisms, and extracts to serve as a foundation for the criticisms; and, on a motion to dissolve the injunction, the question would have been, Whether the Defendant had transgressed certain allowed limits which are not easily defined? I should think, in such a case, that he had not transgressed those limits. It may, perhaps, be fair enough to say, that if the Defendant had inserted in one number a criticism, and in a following number mere specimens, that would be the case of an unprotected plagiarism; but here the Defendant has given no entire act or scene, but only broken and detached fragments of the piece in question.

The case of *Macklin* v. *Richardson* (a) will be found directly adverse to this, when the principle is sufficiently adverted to; and the judges who granted the injunction in that case would, in compliance with the same way of reasoning, have refused it in this. It was there argued, that it was not a case of abridgment or extract only, but professedly the work itself, one whole act of which was published, and the other intended to be so; and Lord Commissioner *Smythe*, upon that ground, distinguished it from the case of *Dodsley* v. *Kinnersley* (b), which was a case of extracts merely. Here the extracts in question amount to no more than six pages out of forty.

In *Wilkins* v. *Aikin* (c) nothing was decided, but the case was sent to law, and the injunction was to be maintained in the meantime, with liberty to sell, the Defendant undertaking to account according to the event of the action. But to support a decree for a perpetual injunction, the Court requires that there shall be nothing like doubt in the case.

Upon the whole, I am of opinion that the bill must be dismissed with costs.

Reg. Lib. B. 1817. fol. 141.

(a) *Amb.* 694.
(b) *Amb.* 403.
(c) 17 *Ves.* 422.

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March 7. 10.
May 26. 30.
July 1. 4.
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April 20.

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Devise and bequest of real and personal estate on trust, to invest the rents and profits, and annual proceeds, while any person beneficially interested in the real and personal estate, by virtue of trusts afterwards declared, should be under 21, for the purpose of accumulation; and, subject thereto, in trust for the eldest son then living of the testator's daughter *C.*, for life; remainder to his first and other sons, in tail, with like remainder to the other living sons of *C.*; with remainder to the eldest living daughter of *C.*, for life; remainder to her first and other sons in tail, with like remainder to the other living daughters of *C.*; remainder to every other son of *C.*, in tail; remainder to the daughters of the testator's eldest grandson; with remainder to the daughters of his other living grandsons; remainder to the daughters of his eldest granddaughter, as tenants in common in tail, with like remainder to the daughters of his other living granddaughters; remainder to the daughters of *C*, as tenants in common in tail, with cross-remainders in tail: and an ultimate limitation to the testator's heir and next of kin; with a proviso, that such persons as should be entitled to an estate in tail in the real estate should not be absolutely entitled to the personal estate before 21, which should, in the mean time, be subject to the trusts before declared: the eldest grandson, an infant, takes a vested estate for life; the trust of accumulation is void, and the infant entitled to maintenance.

Prospective and retrospective allowance to trustee for trouble.

BY his will, dated the 2d of *September* 1813, *Thomas Holloway*, after some pecuniary legacies, devised and bequeathed all his real and personal estate to *S. Marshall*, *V. Lawes*, and *F. Croft*, their heirs, executors, and administrators, upon trust, to convert his personal estate into money; and after payment of his debts and legacies, "to lay out and invest, in their names, the clear surplus monies arising from my personal estate in the purchase of stock in some of the government or parliamentary funds, or upon real securities in England; and, in like manner, to lay out and invest the dividends, interest, and annual proceeds of such stocks and securities, and the rest of my personal estate, and also the clear yearly rents and profits of my real estates, from time to time, as, and when, and so often, and during all such times, as any person or persons beneficially interested in, or entitled to, any real and personal estates, under the trusts hereinafter declared thereof shall be under the age of twenty-one years, adding all such investments to my personal estate, in order to accumulate the same; and upon further trust, as, and when each and every of my grandchildren, who shall not become entitled to my real and personal

personal estates, or some part or share thereof, under the trusts hereinafter declared, shall attain the age of twenty-one years, to raise and pay out of my personal estate, to each and every such grandchild not so entitled, the sum of 1000*l.*; and, subject to the trusts hereinbefore declared, as, to, for, and concerning all my freehold, copyhold, and leasehold, and real and personal estates;" and the stocks and securities to be purchased as aforesaid, upon trust, for the eldest son, then living, of his daughter *Catherine*, then of the age of five years, during his life; and from and after his decease, upon trust, for the first and every other son of his body, lawfully to be begotten, and the heirs of their bodies, with like remainder to his second and third (who was the youngest then living) grandsons; and in failure of such issue, upon trust, for his grand-daughter, the eldest daughter of his daughter *Catherine*, during her life; and from and after her decease, in trust, for her first and every other son, and the heirs of their bodies, with like remainder to his second and third (or youngest living) granddaughter; and on failure of such issue, in trust, for all and every other the son and sons of his daughter *Catherine*, lawfully begotten, successively, according to seniority, and the heirs of their respective bodies; and on failure of such issue, upon trust, for all and every the daughter and daughters of his eldest grandson, as tenants in common, and the heirs of their respective bodies, with benefit of survivorship, with like remainders to the daughters of his second and youngest grandsons; and on failure of such issue, upon trust, for all and every the daughter and daughters of his eldest granddaughter, as tenants in common, and the heirs of their respective bodies, with benefit of survivorship, with like remainders to the daughters of his second and youngest granddaughters; and "in failure of such issue, upon trust, for all and every other the daughter and daughters of my said daughter *Catherine*, lawfully begotten, or to

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be begotten, and hereafter to be born, if more than one, as tenants in common, and the heirs of their respective bodies; and failing issue of any such after-born daughter or daughters, then, as to her or their share or shares, upon trust, for the other daughter and daughters of my said daughter *Catherine*, hereafter to be born, if more than one, as tenants in common, and the heirs of their respective bodies; and in failure of such issue, upon trust, for my right heirs and next of kin, according to the nature and tenure of the said trust estates, respectively: Provided always, and I declare it to be my will and meaning, that such person or persons as shall, under this my will, be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estates until he, she, or they, respectively, shall attain the age of twenty-one years; and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate, under the trusts aforesaid; and, in the mean time, the said leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof, notwithstanding any thing hereinbefore contained to the contrary."

The will then directed, that the testator's grandchildren, and every person who should become entitled to the possession, or the receipt of the rents and profits, of his real and personal estates, should, within a year after attaining the age of twenty-one years and so becoming entitled, assume the surname and arms of *Holloway;* and empowered the trustees to renew the leases of the leasehold estates, and the several tenants for life, when they attained the age of twenty-one years, and became actually entitled to the possession of the estates or receipt of the rents, to grant leases. By three codicils the testator devised

vised property purchased since the date of the will upon the same trusts, and bequeathed some legacies.

The bill filed by *S. Marshall* and *V. Lawes* stated the death of the testator on the 22d of *January* 1816, leaving *Ann Holloway*, his widow, *Catherine Martelli*, (wife of *Horatio Martelli*,) his only child and heiress-at-law, and next of kin, and *Charlotte Ann Martelli*, *Anna Isabella Martelli*, *Catherine Ansley Martelli*, *Horatio Francis Kingsford Martelli*, *Charles Henry Ansley Martelli*, *Thomas Chessher Martelli*, of the respective ages of seventeen, fifteen, fourteen, nine, five, and three years, and *Mary Anne Martelli*, (born after the date of the will,) his grandchildren; and the birth of *Elizabeth Martelli*, another daughter of *Horatio* and *Catherine Martelli*, since the testator's death.

The bill, farther stating that the Defendant *Faithful Croft* declined to prove the will, or act as trustee, and, being the person best acquainted with the testator's affairs, had been employed by the Plaintiffs as their agent, prayed that the Defendants might respectively set forth the rights and interests which they claimed in the real and personal estate of the testator, and that the will and codicils of the testator might be established, and the trusts thereof performed and carried into execution, and that the rights of the several parties in his real and personal estate might be ascertained, and that the Plaintiffs might be indemnified in carrying into execution the trusts of the will and codicils, respectively, the Plaintiffs offering to account for the personal estate and rents possessed by them, and to act in the execution of the trusts of the will, on being indemnified; and in case the Court should be of opinion that the Defendant *Faithful Croft* ought to be discharged from being a trustee, then that proper directions might be given for that purpose, and for his conveying or re-

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leasing the testator's real estates, and for ascertaining the compensation to be made to him for his time and trouble in the conduct of the testator's affairs.

Feb. 28. *March* 7. 10.

A petition was presented for an allowance for maintenance of the infant children of Mrs. *Martelli.*

Mr. *Hart,* Mr. *Roupel,* and Mr. *Raithby,* in support of the petition.

The LORD CHANCELLOR.

Maintenance to infant devisees when allowed, though not authorized by the words of the will.

The Court has never gone farther than this, that though the words of the will do not authorise the application of interest to the maintenance of the infants, yet if it can collect before it all the individuals who may be entitled to the fund, so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance; but if the will contains successive limitations under which persons not in being may become entitled, it is not sufficient that all the parties then living, presumptively entitled, are before the Court, for none of the living may be the parties eventually entitled to the enjoyment of the property. In such a case, the order would be, in effect, to give for the maintenance of one person the property of another. (*a*)

May 26. 30.

A question arising at the hearing, what party should begin,

(*a*) *Greenwell* v. *Greenwell,* 5 *Ves.* 194. *Collis* v. *Blackburne,* 9 *Ves.* 470. *Fairman* v. *Green,* 10 *Ves.* 45. *Lomax* v. *Lomax,* 11 *Ves.* 48. *Ex parte Kebble,* 11 *Ves.* 48. n. 604. *Errington* v. *Chapman,* 12 *Ves.* 20. *Aynsworth* v. *Pratchett,* 13 *Ves.* 321. *Ernal* v. *Barlow,* 14 *Ves.* 202. *Haley* v. *Bannister,* 4 *Madd.* 275. Some early authorities (see 11 *Ves.* 606.) are collected in *Mole* v. *Mole,* 1 *Dick.* 310.

begin, the Lord Chancellor intimated that it was incumbent on those who claimed under the will to proceed to establish their right.

Sir *Arthur Piggott*, Mr. *Preston*, and Mr. *Maddock*, for the eldest grandson of the testator.

1. The estate of the eldest son is vested.
2. The proviso for accumulation is void.
3. The eldest grandson, as tenant of the first vested estate, is entitled to the interest and rents.

If accumulation is directed during a period tending to a perpetuity, that direction, not the gift to which it is annexed, is void. No difficulty can arise as to the realty: an estate for life is clearly vested in the grandson, subject to the clause of accumulation.

With regard to the personalty, the will contains two inconsistent clauses; one giving the property, the other directing accumulation. The Court will reject the direction as far as it is repugnant to the gift. It is not necessary, on behalf of the first taker, to argue the effect of the proviso with regard to other persons. The will contains nothing to extend the accumulation, as to him, beyond twenty-one; at that age it ceases, during the remainder of his life.

The latter clause, on which the heir and next of kin rely, does not contain words to take from the tenant for life the estate already bequeathed to him. The case of *Lord Southampton* v. *The Marquess of Hertford* (*a*) closely resembles the present; the direction of accumulation there being void at common law, not under the statute (*b*),

(*a*) 2 *Ves.* & *Bea.* 54. (*b*) 39 & 40 *Geo.* 3. c. 98.

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the Court could not divide it into portions, but held it as one entire gift, void *in toto.*

Under the statute, so far as the trust of accumulation is void, the Court will reject it, not impeaching the remainder. *Griffiths* v. *Vere* (*a*), *Longdon* v. *Simson.* (*b*) In *Tregonwell* v. *Sydenham* (*c*), the accumulation was established for the benefit of the heir, as a resulting trust. In this case, if the direction of accumulation is good, it must be for the benefit of the tenant for life; but we contend that the direction is void. The gift is distinct from the proviso, which is superadded; being separate and independent, it is governed by the rule in *Mary Portington*'s case (*d*), that a subsequent condition or limitation, when repugnant, is void.

At what time, according to the language of the testator, is this proviso of accumulation to cease? The persons claiming in an opposite interest must mark out clear boundaries. A decision in favour of the next of kin must define the time for which the accumulation shall continue for their benefit. In *Tregonwell* v. *Sydenham*, the time was defined by a limited sum of money. The distinction between that case and *Lord Southampton* v. *The Marquess of Hertford* is, that in the latter, no period could be assigned during which the accumulation was to continue for the benefit of the heir. According to the argument of the heir, the accumulation is good, but the trust of the accumulation is void.

The direction for accumulation does not suspend the vesting in the tenant for life. It cannot be contended that the whole gift is void; that proposition would be con-

(*a*) 9 *Ves.* 127.
(*b*) 12 *Ves.* 295.
(*c*) 3 *Dow.* 194.
(*d*) 10 *Co.* 35.

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trary to *Carter* v. *Barnardiston* (a), and other cases, in which the inheritance is given after the payment of debts: such gifts are construed to be vested remainders, subject to prior chattel interests. The estate of the tenant for life is not avoided by the trust for accumulation; and that trust being void, and the gift to him good, there is nothing to deprive him of the rents and profits. We conclude that the estate of the tenant for life is not impeached by the trusts, and that he is entitled to the rents.

Mr. *Trower* and Mr. *Wetherell*, for the younger children.

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Raithby*, and Mr. *Sugden*, for Mrs. *Martelli*, heiress-at-law and next of kin of the testator; and Mr. *Lynch*, for Mrs. *Holloway*.

The intention of the testator is unequivocal; the question is, whether that intention is conformable to law.

On the clause of accumulation, this case cannot be distinguished from *Lord Southampton* v. *The Marquess of Hertford*. The period during which the accumulation may continue is indefinite. The question in these cases is, whether accumulation may not by possibility, not whether it must not necessarily, extend beyond the limit prescribed by law.

It is a general rule, that trusts for accumulation and gifts by limitation, are subject to the same principles; that a gift to a class of persons, some capable, and some, at the death of the testator, incapable, though there is only a possibility of their existence, is void in the whole,

(a) 1 *P. W.* 505.

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the clause being entire. *Jee* v. *Audley* (*a*), and (to omit intermediate cases) *Leake* v. *Robinson* (*b*), establish this proposition. Some passages in the judgment, in the latter case, show the difficulty to be encountered in modelling this will. (*c*)

Some of the provisions of the statute 39 and 40 Geo. 3. c. 98. involve great difficulty. The statute was designed merely to reduce within certain bounds the power of accumulation as it existed at the common law, and was co-extensive with the power of making gifts by limitation; but not to give validity to any provision previously void. The clauses in *Griffith* v. *Vere*, and *Longton* v. *Simson*, would have been good in the whole, if that act had not passed; and the Court was of opinion, that they remained good so far as they were not impeached by it: but in cases which contravene the rule of law against perpetuities, as *Lord Southampton* v. *The Marquess of Hertford*, the whole is bad. In that respect there is no distinction between this case and the cases in which limitations, including persons capable and persons incapable, are void, as well with regard to the first as to the last. *Routledge* v. *Dorril* (*d*), *Cambridge* v. *Rous*. (*e*) Of the personal estate, it is said, there is a gift subject to an illegal proviso; but, in fact, nothing is given. The persons described are not to have either the real estate, or the *corpus* of the personal estate, or the rents and dividends, until they attain twenty-one. By the proviso, a minor tenant in tail has no interest in either the principal or the rents and dividends of this property.

No property vests either in enjoyment or in right.

(*a*) 1 *Cox*, 324.
(*b*) 2 *Mer*. 363.
(*c*) P. 388, 389.
(*d*) 2 *Ves*. 357.
(*e*) 8 *Ves*. 12.

The

The Court cannot sever the intention, and, recognizing one part as valid, reject another part as void. The intention is clear, that no person shall derive any benefit from the estate before twenty-one. The proviso gives a direction and operation to every clause of the will. To omit it, and execute the rest of the will, would be to contradict the intention. The gift of 1000*l.* to each of the grandchildren, &c. is clearly contingent, and evinces the testator's design, that no devisee or legatee should take any benefit before he attained twenty-one. The words, "subject to the trusts," mean after performance of them. The proviso is part of the gift. The leases granted by the trustees, and the after-purchased lands given by the codicils, are declared to be subject to all the trusts.

The period at which the testator's name and arms are to be assumed, one year after the devisee attains twenty-one, ascertains the period at which he meant the gift to vest. Had he intended an immediate gift he would have directed an immediate assumption of the name.

There being two distinct intentions, one that the property should accumulate during minority, the other that no minor should take an absolute interest, the latter applying to those taking by descent as well as by purchase, the limits prescribed by law are exceeded. With regard to the real estates, the manifest intent of the testator was, that no person should have any interest, either in the capital or the profits, till he attained twenty-one; the gift, therefore, contravenes the rules of law. There is not any devise till the grandson attains twenty-one; and therefore a trust results for the heir.

The Court cannot separate the gifts from the proviso.
All

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All the limitations of the real estate, after the first estate for life, are void. The gifts to unborn persons were not designed to take effect till after the performance of a previous trust, which was too remote and void. All limitations, after a void limitation, are void — *Proctor* v. *Bishop* of *Bath* and *Wells.* (*a*) In *Lord Southampton* v. *The Marquess of Hertford*, this point was not discussed, because the Marquess of *Hertford* would have been entitled as heir in the alternate event; but on the subject of accumulation the late Master of the Rolls seems to have entertained opinions not consonant to prior authorities. *Baker* v. *Hall* (*b*) is opposed to *Grosvenor* v. *Hallum* (*c*), cited in *Tregonwell* v. *Sydenham*. The life estate may be good; but the direction to accumulate being void, the accumulations belong to the heir or next of kin.

The argument, that the personal estate is not vested, is enforced by the direction, that interest shall be accumulated till twenty-one. A gift of maintenance is not equivalent to a gift of interest for the purpose of vesting the fund — *Pulsford* v. *Hunter* (*d*), *Hanson* v. *Graham* (*e*), *Leake* v. *Robinson.* Upon all the authorities the gift is contingent — *May* v. *Wood* (*f*), *Hanson* v. *Graham*, *Batsford* v. *Kebbie* (*g*), *Sansbury* v. *Read* (*h*), *Booth* v. *Booth* (*i*), *Mackell* v. *Winter.* (*k*) In no case has a gift when, or if, the donee should attain a particular age, been held to be vested, without other circumstances, as an ulterior gift if the first donee should die under twenty-one, which renders the condition subsequent

(*a*) 2 *H. Bl.* 358.
(*b*) 12 *Ves.* 479.
(*c*) *Amb.* 463.
(*d*) 3 *Bro. C. C.* 416.
(*e*) 6 *Ves.* 239., see p. 249
(*f*) 3 *Bro. C. C.* 471.
(*g*) 3 *Ves.* 363.
(*h*) 12 *Ves.* 75.
(*i*) 4 *Ves.* 399.
(*k*) 3 *Ves.* 536.

quent instead of precedent — *Bromfield* v. *Crowder* (*a*), *Boraston*'s case (*b*), *Johnson* and *Bellamy*'s case (*c*), *Grant*'s case. (*d*)

Mr. *Preston* in reply.

The gift to the eldest son was present and immediate, and gave a vested interest, and carried with it the right to the profits not effectually given away by the clause of accumulation: the context affords that construction. In *Jee* v. *Audley*, and in *Leake* v. *Robinson*, the objection was to the validity of the gift itself. The gifts were in those cases suspended for a longer period than the law allows. In this instance the gift is good, though the accumulations aim at objects which cannot be accomplished under the provisions of the statute. A life estate may be valid, although ulterior limitations may be too remote and void; and the heir, or the next of kin, has not any interest in the accumulations, even if the trust for accumulation be valid.

In *Hopkins* v. *Hopkins* (*e*) there was a like clause of accumulation, and it prevailed; and this case cannot be distinguished from that. In *Lord Southampton* v. *The Marquess of Hertford*, the fund of accumulation was entire; here it consists of successive portions; and the direction may therefore be sustained as to the part which is good. A gift at common law from three years to three years, for ten years, is not void, but would be apportioned and sustained for nine years; and, in this view of the case, the gift must prevail, and the trust for accumulation must fail.

(*a*) 1 *N. R.* 313.
(*b*) 3 *Co.* 19.
(*c*) 2 *Leon.* 36.
(*d*) Cit. 10 *Co.* 50 a. Sir *Thomas Raymond*, 150.
(*e*) 1 *Atk.* 581. *Ca. Temp. Talb.* 44. 1 *Ves.* 268. *Butler*, *Co. Litt.* 271 b. n. 1.

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The trust for accumulation is a mere prior chattel interest, and does not suspend the right to a vested interest. And as the trust for accumulation is for objects which are too remote, that trust is void as contravening the enactments of the law. The consequence is, that the title of the grandson is in the same state as if there had not been any trust for accumulation, or that trust had determined.

In all cases of conditions or limitations over, which are repugnant to the estate to which the condition or collateral limitation is annexed, the gift remains in full force, although the law denies effect to the condition, or to the collateral limitation; and the law favours the vesting of interests. Indeed, its primary object is to give the benefit of the rents to the person who, for the time being, has the first vested estate. It is not of any importance that the testator has attempted to exclude the grandson: his title is by the rules of law, not the intention of the testator. It was the object of the legislature, in passing the statute, to defeat such an intention.

The words "from and after the performance of the trusts," do not postpone the vesting; they merely subject the life estate to the prior trusts. The language allows the estate to vest, subject to the prior interests. That point was decided in *Carter* v. *Barnardiston*.

Whenever a charge is too remote, or is void because given to a charity, or an object which is incapable, it fails for the benefit of the owner of the estate. So a life estate may be valid, although subsequent limitations may be too remote, and for that reason void, as in *Brudenell* v. *Elwes*. (*a*)

(*a*) 1 *East*, 442. 7 *Ves*. 382.

During

During the argument, the Lord Chancellor remarked, that if the case were within the statute, the excess would be corrected; that there was a material difference between the effect of the proviso, and the accumulation which must take place during the minority of the tenant for life, the will designing not to give an absolute, but a life, interest in the accumulation; that the two clauses together might amount to this, that during the minority of every person entitled, (whether tenant for life, or in tail,) there should be accumulation; that a tenant in tail should not acquire an absolute interest till he attained majority, but should take subject to the previous trusts — the last clause being confined to tenants in tail only, because a declaration that a tenant for life should not be absolutely entitled was unnecessary; that the circumstance, that, in *Lord Southampton* v. *The Marquess of Hertford*, a term of one thousand years was created, subject to trusts of accumulation to be executed during different periods of the term, would not materially distinguish that case from the present, in which the trusts might extend beyond the period limited by law; that, under the clause declaring that tenants in tail should not be absolutely entitled, a person might, in the intention of the testator, be tenant in tail in possession, without being entitled to take the rents.

At the close of the argument, his Lordship proceeded as follows: —

The Lord Chancellor.

I shall not decide this case without referring to the authorities cited, but I have a strong inclination of opinion that it is impossible to declare that, at present, either the heir or the next of kin have any claim. The testator undoubtedly meant, not only to exclude his heir and

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next of kin from all interest, but to render it impossible, that, during the minority of the grandchild, any part of this property should be applied even for the benefit of those for whom he eventually designed the beneficial enjoyment. Whatever may be thought of the morality of that intention, the question to be decided is, what is the law? The scheme of the will is this; having first given pecuniary legacies, the testator then, in one clause, devises and bequeaths all his property, of whatever nature, (there can be no doubt, however, that the terms of a single clause may have very different effects, according to the nature of the property on which it operates,) in trust to sell, *&c.*, and to retain and pay the pecuniary legacies before bequeathed. He then proposes to create an accumulation fund during the minority of the persons whom he describes, expressing, in terms perfectly clear, that a person under the age of twenty-one years was beneficially interested or entitled to the estate devised and bequeathed; and undoubtedly this is a clause of repetition which directs the accumulation to take place during the minority of *all* the persons who should become entitled.

It has been argued that the legacies of 1000*l.* are contingent; supposing that to be so, it will not prove that there were no vested interests in the *corpus* of the estate. The trust to accumulate for this purpose will not, more than a trust for the payment of debts, prevent the vesting. This is a devise of the real and personal estate to trustees, who, subject to accumulation for a limited period, are, by the effect of this will, at the death of the testator, to stand seized and possessed for persons described. How can it be said that they are not to stand so seized and possessed, when the testator expressly says they are, and takes notice that the *cestui que trust* is only of the age of five years?

We

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We all know that, with respect to freehold estates given to a person and the heirs of his body, he is tenant in tail; but as personalty so given does not go to the heir, the old rule of law, possibly to serve the intention, is, that the donee, under the same limitation which gives the real estate to the heir of his body, takes it absolutely. The testator proceeds to limit to unborn grandsons, and, being aware that he could not limit estates for life, he limits to them and the heirs of their bodies, meaning that they should be all in this succession. He has then declared, that the persons named are by him considered as beneficially interested and entitled during their minority, although he has, in that very clause in which he so considered them, directed that accumulation out of those estates in which they are so interested; and although he takes notice that the more immediate objects of the trusts are under the age of five years, and till twenty-one they could not make any alieniation; they did not, in that sense, take an absolute interest, because, at twenty-one, they would have a power of making it their own; but the testator seems to have recollected, that the limitation of the personal estate to them and the heirs of their body made it absolutely theirs; so much so, that if an infant was born, and died in infancy, his administrator, not the heir of his body, would be entitled.

He has not said that they shall not be beneficially interested, but shall not be absolutely entitled. Had it stopped there, I should be glad to know whether there might not be many injuries for which the minors might have demanded compensation, or acts of ownership which they might have exercised, as felling timber; or whether timber felled by a wrong doer would not have belonged to them? Then follows the clause relating to the remoteness of the accumulation, and it concerns not the real estate. It is possible that some of the de-

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visees who have not attained twenty-one might leave issue. Then the personal property would have gone over if it had stopped there; but the testator proceeds in the terms of the proviso. (*a*)

It seems clear, on the language of the proviso, that, although the person was under the age of twenty-one years, the testator thought him tenant in tail in possession, otherwise it is nonsense. Certainly the testator means to say, that no person, tenant in tail in possession of the real estate, however beneficially he takes, shall take an absolute, unqualified estate in the personalty during his minority. Then, considering the period which may elapse before a tenant in tail may attain twenty-one, when, by virtue of both conditions, he is to take an absolute interest in the leasehold, two questions arise, whether the antecedent limitations are good, and the subsequent bad, or whether all without exception are bad? I have had no difficulty about the real estate. We have heard in tithe causes of a dancing modus: this is a clause of accumulation of the same description.

The question which I have to determine to-day is, whether, when the testator has said that the tenant in tail in possession shall not have an absolute estate in the personalty till he attains twenty-one, I am to say that the case is the same with the tenant for life, with regard to the real estate, the testator not having, as to him, said any such thing?

A further question is, whether, because the accumulation is directed with respect to some persons to whom the limitation is too remote, it is not only void in itself, but shall defeat the effect of the other gifts? In the cases of

(*a*) *Vide*, ante, p. 434.

of powers, the testator has meant to give a power which could be exercised among all the objects, and did not mean to give it if it could not be so exercised; but this testator expressly states the case to which he meant the proviso to apply; but he has not said that he meant it to apply to the case of the tenant for life. At present, therefore, the vested interest is in the eldest grandson: whether the heir at law or next of kin may not, at some future time, have an interest, is a question to be considered when the event occurs. The life estate being good, it would not become me now to decide the validity of the ulterior limitations. If the whole devise was void, the heir, or next of kin, would have a right to call on the Court to make that declaration; but the whole is not void; and the present interest does not belong to the heir. The Court is not accustomed to declare the effect of trusts until the time arrives.

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In consequence of Mrs. *Martelli*'s death since the hearing, application was made for judgment. The Lord Chancellor observed, that his opinion on the argument was, that whatever might become of the subsequent limitations, the first limitation to the testator's grandson was good, and that it would be very difficult to hold the next limitation bad. *July* 1.

The LORD CHANCELLOR.

There cannot be any fund for the present maintenance of the infant, unless the income is undisposed of prior to his attaining the age of twenty-one. If accumulation is well directed till he attains that age, then during the interval there is no fund undisposed of. The Court must, *July* 3.

 therefore,

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therefore, determine whether the trust of accumulation is throughout bad, and if so, whether the accumulation between the death of the testator and the time of the grandson attaining twenty-one is undisposed of; in which case of ineffectual gift, so much as consists of rents and profits, belongs to the heir; and so much as arises from personal estate belongs to the next of kin. It is very difficult to distinguish this case from Lord *Southampton* v. the Marquess of *Hertford*. The true doctrine seems to be, that, of a trust for accumulation which, prior to Lord *Loughborough's* act, would have been good, so much as is now within the act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the act, that part remains bad notwithstanding the act.—Lord *Southampton* v. the Marquess of *Hertford*, seems to have decided, that if property is given subject to a trust which is bad, the gift of the property takes effect exempt from the trust. The trust for accumulation in this case, I think, bad, because it may last for ages.

July 4.

The LORD CHANCELLOR stated, that he had again considered the case, and could not distinguish it from Lord *Southampton* v. the Marquess of *Hertford*.

April 22, 1820.—"His Lordship doth declare, that the will of *Thomas Holloway*, the testator, &c. dated, &c., and the three several codicils of the testator, dated, &c. are respectively well executed and proved, and that the trusts thereof ought to be carried into execution, except in so far as the said will directs the laying out and investing

vesting the dividends, interest, and annual proceeds of the stocks and securities in and by the said will directed to be purchased, with the surplus of the said testator's personal estate, after the payment of his debts, funeral, and testamentary expenses, and legacies, and the rest of his personal estate; and also the clear yearly rents and profits of his real estates from time to time, and when, and so often, and during all such times, as any person or persons beneficially interested in or entitled to his real or personal estates, under the trusts thereinafter declared thereof, should be under the age of twenty-one years, and the adding all such investments to his personal estate in order to accumulate the same: And his Lordship doth declare, that such direction to lay out and accumulate the said rents and profits, interest and dividends, is too remote and void in law: And his Lordship doth declare, that the Defendant, the infant *Horatio Francis Kingsford Martelli* is entitled in possession to the rents and profits of the said testator's freehold, and copyhold, and leasehold estates, and to the dividends, interest, and annual proceeds of his personal estate and effects, for and during the term of his natural life, with remainder to the first and other sons of his body lawfully to be begotten, successively, according to seniority of age, and the heirs of their bodies respectively, with such remainders over as in the said will and codicils in that behalf respectively contained." The decree, after the usual directions for an account of the personal estate of the testator, and the rents and profits of his real estates received by the Plaintiffs, proceeded thus: —

"It appearing that the Defendant *Horatio Martelli*, the father of the said Defendants, the infants is dead, it is ordered that the said Master do inquire and state to the Court, by whom the said Defendant, the infant *Horatio Francis Kingsford Martelli*, has been maintained

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since the decease of the said testator, and what sums of money have been paid in respect thereof, and by whom, and what will be proper to be allowed for his maintenance and education for the time past, and to whom; and also what will be proper to be allowed for his maintenance and education, and out of what fund, for the time to come, and to whom; and in making such allowance the said Master is to have regard to the situation and circumstances of the other Defendants, the younger brothers and sisters of the said *Horatio Francis Kingsford Martelli*; and the said Master is to be at liberty to make a separate report, &c. And the Defendant *Ann Holloway*, having elected to take the provision made for her by the indenture of settlement in the pleadings in this cause mentioned to bear date the 17th day of *November* 1798, in lieu of her dower, thirds, and freebench, in and out of the said testator's freehold and copyhold estates, his Lordship doth declare, that the said Defendant *Ann Holloway*, is barred of all claim in respect of such dower or thirds and freebench; and doth order, that the said Defendant do execute a proper and sufficient release of such claims, such release to be settled by the said Master. And it is ordered, that all the costs, charges, and expenses attending the making and executing thereof be paid and discharged by the said Plaintiff out of the personal estate and effects of the said testator, &c.

"And his Lordship doth declare, that the said Defendant *Faithful Croft* is entitled to the leasehold house and premises in *Chancery Lane*, given and bequeathed to him in and by the codicil of the said testator, bearing date the 20th day of *January* 1816, for the remainder of the term of years now to come therein, from the death of the said testator, for his own use and benefit; and it being alleged by the said Plaintiffs, the trustees, that the nature and circumstances

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circumstances of the estate of the said testator require the application of a great proportion of time, by and on the part of the said trustees, for the due execution of the trusts of his said will, in regard to his estate, and that they cannot undertake to continue the execution of the trusts without the aid and assistance of the said *Faithful Croft*, as a co-trustee, he having, during the life of the said testator, had the principal and confidential management thereof, and being better acquainted therewith than any other person, and therefore it will be for the benefit of the said testator's estate that he should continue to be a trustee thereof; and the said *Faithful Croft*, alleging, that due attention to the affairs and concerns of the said testator will require so much of his time and attention as will be greatly prejudicial to his other pursuits and concerns in business, and therefore that he would not have undertaken to act therein, but under the assurance that an application would be made to this Court to authorise the allowance and payment of a reasonable compensation out of the said testator's estate for such his labour and time, and that he cannot continue to act therein without such reasonable allowance being made to him, it is ordered, that it be referred to the said Master to settle a reasonable allowance to be made to the said *Faithful Croft* out of the said testator's estate, for his time, pains, and trouble, in the execution of the said trusts, for the time past, and, in settling such allowance, the said Master is to have regard to the legacy of two hundred pounds given and bequeathed to the said *Faithful Croft* by the said will of the said testator, on the execution of the trusts thereby reposed in him: and it is ordered, that the said Master do inquire whether it will be for the benefit of the said testator's estate that the said *Faithful Croft* should continue to be a trustee under the said will, and to receive a compensation for the future employment of his time and trouble; and in case the said Master shall be

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be of opinion that it will be for the benefit of the said testator's estate that the said *Faithful Croft* should be continued a trustee, then the said Master is to settle a reasonable allowance to be made to the said *Faithful Croft* therein (*a*); and the said Master is to be at liberty to make a separate report, *&c.*: and it is ordered that the said Master do tax all parties their costs, *&c.*: and it is ordered, that the same when taxed be paid to them by the said Plaintiffs, as executors, out of the personal estate and effects of the said testator, *&c.*"

Reg. Lib. B. 1819, fol. 777—780.

The following authentic note of Lord Chancellor *Nottingham*'s judgment on a question intimately connected with the doctrines discussed in the preceding case, is extracted from his Lordship's MSS.

Dec. 28. 33 *Car.* 2. 1681.

CHARLES HOWARD, PLAINTIFF, *v.* HENRY Duke of NORFOLK, & *al.* DEFENDANTS.

A term being limited in trust for *H.* in tail, remainder, if *I.* die without issue male in the life of *H.* to *C.*, in tail; the remainder is good.

This case had been largely argued and debated at bar last term, Serjeant *Maynard* and others, for the Plaintiff, and Mr. *Pollexfen* and others, for the Defendants, in the presence of the three Chief Justices, whom I called to my assistance; and now this term we delivered our opinions. The three Chief Justices were for the Defendants, and advised a dismission (*b*); I was for the Plaintiff: my argument was as follows: —

(*a*) *Brocksopp* v. *Barnes*, 5 *Madd.* 90.

(*b*) Their arguments are reported 3 *Ca. in Cha.* 14, *et seq.* 2 *Rep. in Cha.* 121.

This

This is the case. The Plaintiff, by his bill, demands the benefit of a term for 200 years in the barony of *Greystock*, upon this case.

Henry Earl of *Arundell*, father of the Plaintiff and Defendant, had issue six sons, *Thomas*, *Henry*, *Charles*, *Edward*, *Francis*, *Bernard*, and one daughter, the Lady *Katherine*. *Thomas* Lord *Matrevers*, the eldest son, being *non compos mentis*, care is taken to settle, by advice of counsel, the estate and family, as well as the present circumtances of it would admit.

Whereupon, two indentures are made, between the Earl of *Arundell*, of one part, and the Duke of *Richmond*, the Marquess of *Dorchester*, the Lord *Howard* of *Estrick*, and Sir *Thomas Hatton*, on the other part, and both these indentures bear the same date, 21st *March* 1647. By one of these indentures the estate in law is conveyed to them and their heirs, to these uses, *viz.* to the Earl for life, remainder for 99 years, to trustees, to raise 8000*l.* portion for the Lady *Katherine*, remainder to the Countess for life, all which estates are spent; remainder for 200 years to the Duke, Marquess, *&c.*, in trust, as by another indenture of the same date is declared; remainder unto *Henry*, and the heirs male of his body begotten, with like remainders to *Charles*, *Edward*, *Francis*, and *Bernard*, successively, with power of revocation. Then the other indenture declares the trust of the term for 200 years in this manner, *viz.* that it should attend the inheritance so long as *Thomas* Lord *Matrevers*, or any issue male of his body should be living; but if *Thomas* die without issue male in the life of *Henry*, not leaving his wife enseint with a sum, or that, after the death of *Thomas*, by the failure of issue male of *Thomas*, the dignity and honour of Earl of *Arundell* do descend upon *Henry*, then *Henry* shall have no farther benefit

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benefit of the term of 200 years, but the benefit thereof shall redound to the other younger children, or their issues in manner following, *viz.* to *Charles*, and the heirs male of his body, with like remainders in tail to *Edward*, *Francis*, and *Bernard*, successively.

These indentures were sealed and delivered in the presence of Sir *Orl. Bridgman*, and *John Alcorn* and *Edward Alcorn*, his two clerks, who have subscribed their names as witnesses, which is to me a demonstration that the deeds were drawn by Sir *Orl. Bridgman* himself. After this the contingency happened, and the earldom of *Arundell* did descend unto *Henry* the now Duke of *Norfolk*, *Thomas* being dead without issue male.

Then the Marquess of *Dorchester*, being the surviving trustee of the term, assigns this term to *Marriot*, in 1675, upon the same trusts, and *Marriot* assigns to *Henry*, the Defendant, so the term is merged.

To excuse the Marquess of *Dorchester* for co-operating in this manner, it is said that the tenants would not renew unless the estate were transferred to a younger man, for fear of paying a new fine after the Marquess's death. But nothing can excuse *Marriot* from a palpable and wilful breach of trust, if *Charles* have any title at all to the benefit of this trust.

Therefore the labour of this case is to overthrow *Charles*'s title, 1st. as void in the original limitation, 2d. as being avoided, if not by the merger, at least by the common recovery which was afterwards suffered by the Duke. If the estate be void there is no harm done; but if it be only avoided by the surrender of *Marriot* to the Defendant, perhaps all they who had notice of this trust, and

and have wilfully procured the defeating of it, may be liable to answer for it.

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These kind of defences do not seem to me to be very consistent; for, if the Defendant's counsel had been very clear in their opinions, that the limitation to *Charles* was void, why did they advise the Duke to take so much pains to procure a surrender and extinguishment of the term, and further, to bar it by a common recovery? For now it is come to this point in law, that unless the limitation to *Charles* be void, all other means to defeat him of it will be ineffectual. I am in a very great streight by the advice which hath been given me; for as on one side I may safely concur with the three Chief Justices, since, if I should err in so doing, I should err very excusably, because I should *errare cum patribus*, so on the other side, where the decree must be mine, and I alone am to answer for it, I dare not (notwithstanding the reverence I have for their advice) pronounce a decree in any case where I cannot concur with it myself.

The main inquiry is, whether the limitation to *Charles* be void? Wherein these things are plain; 1st. The term in question, though it were attendant on the inheritance at first, yet, after the contingency happened, it is severed and become a term in gross. 2d. The trust of a term in gross can be limited no otherwise in equity than the estate may be limited in law. 3d. The legal estate of a term for years, whether it be a long or a short term, cannot be limited to any one in tail with a remainder over, for this tends directly to a perpetuity. 4th. Nay, if a term be limited to a man and his issue, and if that issue die without issue, the remainder over, though the issue of the issue take no estate, yet, because the remainder cannot commence sooner than till issue fail, which is foreign to expect, the remainder is void, for

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for this also tends obliquely to a perpetuity — 13 *Car.* 2. *Perce* and *Reeves*'s case (*a*). 5th. Further, yet if a term be limited to a man for life, with contingent remainders to his first, second, third, and tenth son in tail, remainder over, though the contingencies never happen, yet the remainder shall never take place, for the mere intention to create a perpetuity made all void — 16 *Car.* 2. Sir *William Backhouse*'s case (*b*). 6th. And *Burges*'s case (*c*), 26 *Car.* 2., went a step further, for there the trust was to the husband for life; remainder to the wife for life; remainder to the first, second, third, and tenth sons in tail; remainder to their daughters, having then a daughter, *Elizabeth*, in whom that remainder might vest; yet adjudged, that a remainder to daughters after unbegotten sons, was void, though no sons were then born; and the administratrix of the husband carried away the term, for still this looks like a perpetuity. 7th. Nevertheless, if a term be limited to one for life, with twenty several remainders for lives to other persons successively, who are all alive and in being, so that all the candles are lighted together, this is good enough, though it be a possibility upon a possibility, as was ruled — 13 *Car.* 2. in *Alford*'s case; nay, if a remainder be limited to a person not in being; as, to *A* for life; remainder to *B* for life; the remainder to the first issue male which *B* shall have for life; though this be a contingent upon a contingent, yet it being only a contingency for life, this also is good, as was ruled, 14 *Car.* 1. *Cotton* v. *Heath* (*d*); for to limit a possibility upon a possibility, or a contingency upon a contingency, is neither unnatural nor absurd; but the rule which is laid down to the contrary by

(*a*) *Pollexfen*, 29.

(*b*) *Backhouse* v. *Bellingham*, *Pollexfen*, 33.

(*c*) *Burges* v. *Burges*, *Pollexfen*, 40. *Rep. Temp. Finch*, 91. 1 *Ca. in Cha.* 229. 1 *Mod.* 114.

(*d*) *Pollexfen*, 26. 1 *Eq. Ca. Ab.* 191.

by *Popham* in the Rector of *Chedington's* case (*a*), looks like a reason of art, but hath nothing at all of true reason in it; and I have known that rule denied at law; and my Lord *Coke* himself denied that rule, when he was Chief Justice, as you shall find, 13 *Jac*, *B. R. Blandford*, and *Blandford's* case (*b*); for however that rule may hold in some cases, yet, if it should pass for a general rule, my Lord *Coke* says it would shake all common assurances; and he cited *Paramour* v. *Yardly's* case (*c*) as a judgment in point, that the devise of a term was good, though it were with a possibility upon a possibility; and indeed every devise of a term is so.

These conclusions thus laid down, are only preliminaries to the main debate; and though by these conclusions we may see what the law is in all those cases which do any way border upon the present question, yet now 'tis fit to speak to the question itself, as it stands alone, and is distinguished from all these preliminaries; and then the point is this: —

The trust of a term for 200 years, in the barony of *Greystock*, is limited to *Henry* in tail, proviso, if *Thomas* die without issue male in the life of *Henry*, then it shall go to *Charles* in tail; remainder in tail to *Edward*, *Francis*, and *Bernard*, successively. And whether this be a good limitation to *Charles* in tail, is the question? For the last remainders to *Edward*, *Francis*, and *Bernard* are certainly void.

It hath been said at bar, that the limitation to *Charles* is void too, because it is a possibility upon a possibility; but this reason, as hath been shown already, is of no moment at all, because indeed it is impossible to limit

(*a*) 1 *Co.* 153. *Moor.* 478. 3 *Bulstr.* 98. *Godb.* 266. *Cro.*
(*b*) 1 *Rolle*, 318. *Moor.* 846. *Jac.* 394.
(*c*) *Plowd. Comm.* 539.

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any remainder of a term after a life; but it will be in effect a possibility upon a possibility. It hath been said, too, at the bar, that the proviso by which *Charles*'s interest doth rise is void, because the nature of a condition is to determine all the estates; and here the proviso determines only the estate of *Henry*; whereupon it hath been compared to Sir *Anthony Mildmay*'s case, *Co. L.* 6. (*a*), where a proviso to make the estate tail cease, as to one brother, and go over to another, is void. Never was rule or case worse applied, for here the proviso does as it should do, viz. it doth determine all the estate to which it is annexed. Observe, there is no proviso at all annexed to the legal estate of the term; but there are two equitable estates built upon that term by way of trust; the first is a trust attendant upon the inheritance in *Henry*, and to that only is the proviso annexed, and that is entirely determined; the latter is a new trust in gross, which is to rise by the proviso, and *ergo*, could not be defeated by it. But the matter chiefly insisted on is, that the limitation to *Charles* is against the rules of law, and tends directly to a perpetuity. If this be so, there needs no other reasons or arguments to destroy it, for the law hath so long laboured to defeat perpetuities, that now it is become a sufficient reason of itself against any settlement, to say it tends to a perpetuity. Let us, *ergo*, examine what a perpetuity is, and how far that is here introduced, or any other rule of law broken. A perpetuity is a settlement of an estate, or interest in tail, with such remainders over, that no act or alienation of the present tenant in tail can never bar those remainders; but they must continue perpetually, and be as a cloud hanging over the present possession: such perpetuities fight against God, by affecting a stability which human providence can never attain to, and are utterly against the reason and policy of the common law.

(*a*) 6 *Co.* 40. *Moor.* 632.

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But yet future interests, or springing uses or trusts, or executory remainders, which are to emerge and arise upon contingencies, are quite out of the rule and reason of perpetuities, and out of the danger of them too, though they are not dockable by recovery, nor capable of being barred, especially if the contingency be not remote, nor of long expectation, but such as will wear out in a short time. Examine this a little in case of a freehold, and then see how it will hold in case of a term, or the trust of a term, which, whether it be a longer or a shorter term, I agree, makes no difference. In the first place, *ergo*, I utterly deny that rule which hath been laid down by my Lord Chief Justice *North*, *viz.* that where no present remainder can be limited, there can be no remainder upon any contingency; for there is no clearer rule in law than this, that there can be no remainder limited upon an estate in fee, 19. *H.* 8. *Dyer* 4.; yet public reason and the convenience of common assurances have found a way to pass by this rule, as well by way of limitation of use, as by way of devise; and, *ergo*, if the father limit an use to himself and his heirs, until a marriage happen, and then to the son and his heirs, this is a good fee upon a fee, by common experience; so a devise to a man and his heirs, and if he die without issue before twenty-one, or living *B.*, to *B.* in fee, this is a good fee upon a fee (*a*), as hath been resolved 18. *Jac.* *Pells* and *Brown*'s case, 22. *Jac.* (*b*) a point in the *Serjeant*'s case (*c*), *Hall* and *Deering*, in 59. (*d*), *Hanbury* and *Cockrell* 51. (*e*), *Jay* and *Jay*, *per Rolle et Curiam* (*f*), and this had been re-

(*a*) "But if it had been said, and if he die without heir living *B.*, to *B.* in fee, this would not prevent the escheat, per *North*; *fortasse* case stands upon a different reason, *tamen quære, quia videtur mihi eadem ratio et eadem lex.*"

(*b*) *Cro. Jac.* 590. *Bridgm.* 1. 2 *Rolle*, 196. 216. *Godb.* 282. *Palm.* 131.

(*c*) 2 *Rolle*, 422.

(*d*) *Hardr.* 148.

(*e*) *Hardr.* 150.

(*f*) *Style*, 258. 274.

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solved long before in 20. *Eliz. Hind* v. *Sir John Lyon* (*a*), and with the reason of these resolutions agree 38. *Eliz. Fulmerston* and *Steward*'s case (*b*), and 43. *Eliz. Wellock* and *Hammond*'s case (*c*), cited *Co. l.* 3. *Boraston*'s case. (*d*) For where the contingency expires in a little time, the inconvenience can neither be great nor long, nor is there any danger of a perpetuity. This is agreed by all in cases of an inheritance, but they say a lease for years, which is but a chattel, will not bear such contingent limitations, nor admit of such springing trusts, by reason of the exility and meanness of the state. Now as to this point, the difference between a chattel and an inheritance is a difference only in words, and not in the reason or nature of the thing, for the owner hath as absolute a power over his lease as over his inheritance; and, *ergo*, where no perpetuity is introduced, nor any visible inconvenience appears, there no rule of law is broken. And the reasons to support the springing trusts of a term, as well as the springing uses of an inheritance, are these:

First. Because many men have no other estates but what do consist in leases for years, and, *ergo*, it were not only hard, but very absurd, to disable the owner of such an estate to provide for the contingencies of his family, especially such contingencies as are neither foreign nor remote, or of long expectation, but within view and prospect, as it were, and so will quickly be at an end. Such a contingency is that in this case, *viz.* the death of one man before another, &c.; and put the case, the lessee for years being to marry his son, assigns his term to *A.*, in trust, for himself, his executors and administrators, until a marriage happen, during the father's life, then in trust for the married couple, is this springing trust void? How

(*a*) 2 *Leon.* 11. 3 *Leon.* 64. 70.
(*b*) *Cro. Jac.* 592.
(*c*) *Cro. El.* 204. 2 *Leon.* 114.
(*d*) 3 *Co.* 20.

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many settlements will that defeat? So a springing trust good in that case, why not in this too?

Secondly. The limitation to *Charles* is upon this contingency: — If *Thomas* die without issue male, living *Henry*, so that the earldom of *Arundell* descend upon *Henry*, which was a common and natural possibibility. Now if the limitation had stopt at these words, "If *Thomas* die without issue male," it could but have been void in that case; but if the addition of these other words, "living *Henry*, so that the earldom descend," have not mended the matter, but that the limitation be void still, then all this additional clause goes for nothing, which were very absurd.

Thirdly. Which I take to be unanswerable, and which I ground upon something that fell from my Lord Chief Justice *Pemberton*; suppose it had been said, if *Thomas* die without issue, living *Henry*, not only the trust to *Henry*, but the very lease itself for 200 years should cease, and, in such case, a new term should be created for other 200 years, to vest in the same trustees for the benefit of *Charles*, in tail, no man can doubt but this new lease would have been good; and my Lord Chief Justice *Pemberton* confesses, that this way the intention of the Earl of *Arundell* might have taken effect. Then I would be glad to hear a tolerable reason why may not a new springing trust be limited upon the same lease, as well as a new springing lease upon the same trust? Surely to deny this were to make a distinction without a difference; nay, I will be bold to say, that a new springing lease is the harder case of the two, for it hath a direct tendency to a perpetuity, if such a practice be allowed, and is much more inconvenient than a new springing trust upon the same lease can be.

 Fourthly,

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Fourthly, No reason at all is given why this may not be; but that the law hath so mean a consideration of a term for years, which is but a chattel interest, it will never suffer such contingent limitations to be built upon it. Now, as this is no reason in any other part of the world, so it is a reason that by this time begins to be quite exploded out of *Westminster* Hall, and most certainly can never take place in Chancery. There was a time when this reason did so far prevail, that all the judges of *England* being assembled in Chancery, for the assistance of the Lord Chancellor *Rich*, declared the law to be, that if a lease be devised to *A.* for life, and if *A.* die, living *B.*, *B.* to have the residue of the term, this remainder is void; for in the consideration of the law the life of a man was a greater estate than any lease for years, though *A.* had the whole term, so it was ruled, 6 *Edwd.* 6. *Dyer*, 74. And the same opinion held current in other cases, until 10 *Eliz. Dyer*, 277. But this being a reason against sense and nature, it was impossible for the world to be long governed by it; and *ergo*, in 15 *Eliz. Dyer*, 328, the matter began to be a *quære*, and in 19 *Eliz. Dyer*, 358, it was adjudged the remainder was good, which is the same case with *Welden* and *Elkington*'s case in the Commentaries, *Plowden*, 519. When the Chancery saw the judges of the common law begin to govern themselves by the true reason of the thing, and not by the vulgar reason of the books, they took a course to fix the judges in this opinion; for then it began to be a common suit in Chancery, for him who had the remainder of a term to exhibit his bill against the devisee for life, to compel him to put in security, not to bar the remainder; and it was often so decreed, 26 *Eliz. Price* v. *Jones* (*a*); and again by my Lord *Ellesmere*, 5 *Jac.*, *Cole* v. *Moor*, Sir *Francis Moor*, 806, *Pl.* 1093. At last, to prevent a Chancery suit, viz.

(*a*) *Toth.* 122.

7 *Jac.*,

7 *Jac.*, *Matthew Manning*'s case (*a*), and 10 *Jac.*, *Lampet*'s case (*b*), the judges came to be uniformly agreed, that the remainder was good by way of executory devise, and that the devisee for life could not bar it. So now, at last, notwithstanding the exility of a term, and the meanness of a chattel interest, there may be a devise of it for life with executory remainders; but it is true, the judges did not wisely refuse to enlarge this rule to executory devises in tail, with remainders over, for that were directly a perpetuity; yet, why they should refuse to admit of a devise without such contingent limitations or trusts, which do not lead to a perpetuity, nor are attended with any inconvenience, is hard to understand, nor is any reason given but *Child* and *Bayly*'s case. (*c*)

Fifthly. In the last place, *ergo*, since all that hath been, or can be, materially objected, is reduced to the single and naked authority of *Child* and *Bayly*'s case, it will be fit to see, 1st. What *Child* and *Bayly*'s case is; 2d. How far this authority ought to sway the present case. 1st. If that case were as it is reported by Serjeant *Rolle*, then it is nothing at all to this question, for there the case is said to be this: A term of seventy-six years was devised to the wife for life, remainder to *William Heath*, the son; proviso, if *William* die without issue during the term (not during the life of *Thomas*,) *Thomas* should have it; adjudged a void remainder. Of this there can be no manner of doubt, for it is the common case of a remainder after an entail of a term, and a direct perpetuity, and the case hath often been cited to this purpose, and generally hath been taken in *Westminster* Hall to import no more, though of late it hath been more narrowly looked into.

(*a*) 8 *Co.* 94.
(*b*) 10 *Co.* 46.
(*c*) 2 *Rolle*, 129. *Palm.* 48. 333. *W. Jones*, 15. *Cro. Jac.* 459.

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2. If the case were as it is reported by Justice *Jones*, *viz.* if *William* die without issue, living *Thomas*, then to go to *Thomas*, and still adjudged a void remainder, then it is a direct authority in the very point. But the case is not altogether as Justice *Jones* hath reported it, for I have seen a copy of the record upon this occasion; and by the way, there is no book in the law so ill corrected, and so grossly misprinted, as Justice *Jones*'s Reports. 3. The truest report of this case, and that which comes nearest to the record, is the report of Justice *Croke*, and with him agrees Serjeant *Rolle*, in his abridgment, tit. devise, 612., and there the case was; a term of 76 years was devised unto *Dorothy*, the wife, for life; remainder to *William*, and his assigns, for all the residue of the term, proviso, if *William* die without issue living at the time of his death, that *Thomas* shall have it, adjudged the remainder void.

This also is in effect the present question, but yet it must be observed, that the resolution there went upon several reasons which are not to be found in this case, as, 1. *William* having the term to him and his assigns, there could be no remainder of it to *Thomas*, of which word assigns Justice *Jones* takes no notice. 2. *Dorothy*, the devisee for life, was also executrix, and she did assent, and grant the remainder to *William*, both which reasons Serjeant *Rolle*, in his abridgement, lays hold of, 3. *William* might have assigned his interest, and then his assignee must have held it till *William* died without issue, after which there could be no remainder. 4. *William* might have had issue, and that issue might have died without issue, living *William*, and then a remainder to *Thomas*, after such a possibility, was foreign to expect. 3. The record goes a great deal farther, and says, if *Thomas* die without issue living at his death, then it shall go over to daughters; which was a plain affectation of a perpetuity, by multiplying

multiplying of contingencies. 6. It appears by the record, that the lease for 76 years was made 1 and 2 *Philip* and *Mary*; the father's will was made 10 *Eliz.*; the grant and assignment by the mother and executrix to her son *William* was 24 *Eliz.*; the son *William* re-assigned all to his mother in 31 *Eliz.*, and died; the mother lived till 1 *Jac.*; *Thomas*, the son, never set on foot his pretence to the remainder till 14 *Jac.*, before which time there had been six several assignments to purchasers, and the last purchaser had renewed with the Bishop of *Worcester*: no wonder then if, after so long an acquiescence by *Thomas*, and when there were but a very few years to come of that lease whereof *Thomas* claimed the remainder, the judges held hard upon him, and chose rather to declare *Thomas's* remainder void, than to disturb so many transactions amongst purchasers.

2. But now, allowing that *Child* and *Bayly's* case were as full an authority for the Defendant as he could wish, I say, then, that *Child* and *Bayly's* case stands alone, and that it was never so resolved, before nor since. Nay, the contrary hath been resolved since; and first, the case of *Cotton* and *Heath*, 14 *Car.* 1. *Rolle.* Devise 612 (*a*) seems contrary to it, for there a term was devised to *A.* for eighteen years, remainder to *B.* for life, remainder to the eldest issue male of *B.* for life, resolved by *Jones*, *Croke*, and *Barkly*, that this second contingent remainder was good, because this second contingency lasted no longer than during one life. But the most clear and direct resolution in the point, was the case of *Wood* and *Sanders*, 21 *Car.* 2., in this Court, *July* 1669. (*b*) The case was this. The trust of a long lease was limited, and declared thus; to the father for sixty years, if he live so long,

(*a*) *Pollexfen*, 26. 1 *Eq. Ca. Ab.* 191.

(*b*) *Pollexfen*, 35 1 *Ca. in Cha.* 131.

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long, then to the mother for 60 years, if he live so long, then to *John* and his executors, if he survive father and mother, and if he die in their life, having issue, to their issue, but if he die without issue, living father and mother, remainder to *Edward*, in tail, remainder to *Nicholas*, in tail; *John* dies without issue, living father and mother, resolved the remainder to *Edward* was good, for though the whole term might have vested in *John* and his issue, if he had survived father and mother, yet, that contingency never happening, and being a contingency which would wear out in a little time, the remainder was good, by the uniform opinions of Lord *Bridgman*, *Custos*, *Twisden* and *Rainsford*, which is as contrary to *Child* and *Bayly*'s case as can be; so that though I may seem to be singular in my opinion this day, yet I take myself to be supported in the reasons I go upon by seven great men, *viz.* Lord *Coventry*, *Jones*, *Croke*, and *Barkly*, Lord *Bridgman*, *Twisden* and *Rainsford*. Thus we see the opinion of Sir *Orl. Bridgman*, when he was a practiser, and drew this deed, continued with him when he was *custos*, and to judge upon oath; and it is due to the memory of his great man to acknowledge him a person very eminent both for learning and integrity.

It hath been urged at the bar, Where will you stop if you do not stop at *Child* and *Bayly*'s case? I answer, I will stop everywhere when any inconvenience appears, no where before. It is not yet resolved what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare what are the utmost bounds to the springing trust of a term, for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known.

I have done with the legal reasons of this case; the equitable reasons are much stronger. 1st. It was prudent to take care, that when the honor descended upon *Henry*,

Henry, a little better support should be provided for *Charles*, the next brother. 2d. This prudent care was the effect of a deliberate consultation of the whole family, after advising with learned counsel upon it. 3d. Though it were uncertain whether *Thomas* would die, living *Henry*, yet it was nearly certain, that whenever *Thomas* did die he would die without issue; for it so much concerned the honor of the family not to have it propagated by him, that care was taken so to keep him that he might never marry till he was recovered. 4. It is a very hard thing for a son to tell his father that the provision made for his next brother is void; and it is yet harder to tell him so in Chancery, especially where the reasons for making the conveyance void are not gross and apparent, but depend upon such a nicety and subtlety of law, as will justify different opinions.

2. The last retreat of the Defendant in this case is, to the common recovery, by which, and by the merger of the term, the legal estate for 200 years is barred and gone. This point is not worth speaking to, for whether the law be so or not, is not material, because the trust of the term, if well limited unto *Charles*, whatsoever hath been done to break in upon this trust and to defeat it, by them who had notice of the trust, and were privy to it, though it be never so good in law, yet it ought to be set aside in equity; and in this we all agree in opinion. Now, in this case neither the Duke nor Mr. *Marriot* could be ignorant of the trust limited to *Charles*; and if *Thomas* Duke of *Norfolk* were dead in *October* 1774, or before the Marquess *Dorchester* assigned to *Marriot*, or *Marriot* to the Defendant, and before the recovery suffered, then they must needs know that the trust was actually attached and vested in *Charles* at that very time when they went about to defeat it. And if an heir will either enter upon the trustees, or procure the trus-

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tees to release in breach of trust, he himself is bound to make good the trust; nay, the land stands charged with the trust in the hands of the heir, and he alone may be sued without making the trustees parties, as was twice resolved by my Lord *Bridgeman Custos*; once in *M.* 22. *Car.* 2. *Anno*, 1690, in the case between *Spencer* and the Earl of *Thomond*; and again in the same term in another case between *Jackson* and *Jackson*. But here the heir, and *Marriot* the trustee, are both Defendants. Wherefore there ought to be a decree for the Plaintiff; 1. For his quiet enjoyment during the residue of the 200 years. 2. For an account of the profits since the death of *Thomas*. 3. The Duke and *Marriot* both to be responsible to the Plaintiff. Nevertheless, I have so great a respect for the contrary opinions of the three chief justices, that I will not presently suffer this decree to pass, but will suspend my opinion for some time; and, possibly, considering how many assurances may be shaken, and how many noble families may be concerned in the consequences, if such kind of settlements be overthrown, it may be fit, at last, to adjourn this case into Parliament for difficulty. But of this I declare nothing at present. (*a*)

1818.
July 31.
Aug. 7. 15.
1819.
May 1. 4.
8. 11.
Aug. 23.

In the Matter of the Masters, Governors, and Trustees of the *Bedford* Charity.

Jews are not entitled to the benefit of the *Bedford* charity. Whether that question could be decided on a petition presented under the statute 52 Geo. 3. c. 101. *Quære.*

THE petition of *Joseph Lyon*, of the town of *Bedford*, in the county of *Bedford*, *Sheba Lyon* his daughter, *Michael Joseph*, of the same place, *Samuel Samuel*, *Joseph Cohen*, *Isaac Lyon Goldsmid*, *Isaac Selig* and *Alexander Levi*, of the city of *London*, Esqrs., five of the elders

(*a*) Lord *Nottingham's* final judgment, of which his Lordship's MSS. contain no note, may be found in 3 *Ca. in Cha.* 47.

elders of the congregation of the Dutch and German Jews assembling at the Great Synagogue in *Duke's* Place, and *Levi Salomons*, *Moses Levi Newton*, *Meyer Salomons*, *Raphael Raphael*, and *Michael Abraham Levy*, of the city of *London*, Esqs., five of the elders of the congregation of the Dutch and German Jews assembling at the New Synagogue in *Leadenhall* Street, stated, That his late Majesty King *Edward* the Sixth, by his letters patent, under the Great Seal of *England*, bearing date the 15th day of *August*, in the sixth year of his reign, on the petition of the mayor, bailiffs, burgesses and commonalty of the town of *Bedford*, to him made for the erecting and establishing a free and perpetual school there, for the education and instruction of children and youth, did grant and give licence for him, his heirs and successors, to the mayor, bailiffs, burgesses, and commonalty of the town of *Bedford*, and their successors, that they or their successors, might and should make, erect, ground, and establish a free and perpetual school in the town of *Bedford*, for the education, institution, and instruction of children and youth in grammar and good manners, to endure for ever after, the school to be of one master and one usher; and the wardens and fellows of *New College* in *Oxford* were thereby constituted visitors of the grammar-school, and nominators and admitters of the masters and usher, with power to remove them for just causes, and to appoint others to act in either station; and to the end that the intent of the mayor, bailiffs, &c., should take better effect, his said majesty, by the said letters patent, did grant and give licence for him, his heirs, and successors, to the mayor, bailiffs, &c., that they or their successors might have, enjoy, and receive the lordships, manors, and tenements, &c. and other possessions whatsoever, to the yearly value of 40*l.* above charges and reprises, of the gift, grant, legacy, demise, or assignment of any person or persons whatsoever, though the same

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same lordships, manors, &c., were holden of the king *in capite*, or otherwise, mediately or immediately, or of any other person or persons, to have and to hold to the same mayor, bailiffs, &c. and their successors, in and to the sustentation of the master and usher, and for the continuance of the school for ever, for the marriage of poor maids of the town, and for poor children there to be nourished and informed, and also of the surplusage coming or remaining of the premises, to distribute in alms to the poor of the town for the time being. (*a*)

The

(*a*) The following is a copy of the letters patent:—

Vivat Rex

Edwardus sextus Dei gratiâ Angliæ Franciæ et Hiberniæ Rex, fidei Defensor, et in terra Ecclesiæ Anglicanæ et Hiberniæ supremum caput, omnibus ad quos presentes litteræ pervenerint salutem. Sciatis quod nos ad humilem petitionem maioris, ballivorum, burgensium, et communitatis, villæ nostræ Bedford, nobis pro liberâ et perpetuâ scolâ ibidem erigend. et stabiliend. exhibit. pro institutione et instructione puerorum et juvenum, de gratiâ nostrâ speciali, ac ex certâ scientiâ et mero motu nostris, Nec non de advisamento concilii nostri, concessimus et licenciam dedimus, ac per presentes concedimus et licenciam damus, pro nobis et heredibus et successoribus nostris, quantum in nobis est, dictis maiori ballivis burgensibus et communitati dictæ villæ nostræ Bedford, et successoribus suis, quod ipsi aut successores sui quandam liberam et perpetuam scolam grammaticalem, in villâ nostrâ predictâ, erigere, facere, fundare, et stabilire, possint et valeant, pro educatione, institutione, et instructione puerorum et juvenum, in grammaticâ litteraturâ et bonis moribus, perpetuis temporibus futuris duratur. ac Scolam illam fore de uno magistro sive pedagogo, et uno subpedagogo sive Hypodidasculo, pro perpetuo continuatur, et ut dicta intentio predictorum maioris ballivorum burgensium et communitatis villæ predictæ, meliorem capiat effectum, de uberiori gratia nostrâ concessimus et licenciam dedimus, ac per presentes concedimus et licenciam damus, pro nobis heredibus

The petition farther stated, that by indenture, dated the 22d of *April* in the 8th year of the reign of *Elizabeth*, and

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redibus et successoribus nostris predictis, quantum in nobis est, predictis maiori ballivis burgensibus et communitati villæ nostræ predictæ, quod ipsi aut successores sui, dominia, maneria, terras, tenementa, redditus, reversiones, revencōes, servitia, et hereditamenta quæcunque, et alias possessiones quascunque, ad annuum valorem quadriginta librarum, ultra omnia onera et reprisas, ex dono concessione legacione dimissione vel assignatione, cujuscunque personæ sive personarum quarumcunque, ea eis dare concedere legare vel assignare volentis vel volentium, licet dominia maneria terras et tenementa illa, de nobis in capite vel aliter mediate vel immediate teneant. aut de aliis personis sive aliâ personâ teneant. habere gaudere percipere acquirere perquirere et recipere possint et valeant, Habendum et tenendum eisdem maiori ballivis burgensibus et communitati villæ predictæ et successoribus suis, in et ad sustentationem predicti magistri sive pedagogi et subpedagogi sive hypodidasculi, et pro continuatione scolæ predictæ imperpetuum, pro pauperibus virginibus villæ predictæ maritand. ac pro pauperibus pueris ibidem nutriend. et informand. ac etiam ad elemosynam de residuo sive superfluitate premissorum proveniend. remanen. pauperibus villæ predictæ pro tempore existentibus distribuend. Ac etiam concessimus et licentiam dedimus, ac per presentes concedimus et licentiam damus, pro nobis heredibus et successoribus nostris, de avisamento et assensu predicto, quod guardianus sive custos collegii Beatæ Mariæ Winton in Oxon, vulgariter nuncupat. novi collegii Oxon, et socii ejusdem pro tempore existentes, vel eorum major pars pro tempore existentium, de tempore in tempus cum necesse fuerit vel justa occasio postulabit, per eorum discretiones, dictum magistrum sive pedagogum aut dictum subpedagogum sive hypodidasculum scolæ predictæ in villâ predictâ, nominare eligere et admittere possit vel possint, et pro bonis justis et rationalibus causis et occasionibus, illos de tempore in tempus

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and made between the mayor, bailiffs, &c. of the town of *Bedford* of the one part, and Sir *William Harper*, Knt. and

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tempus mutâre et removere, aliosq. habiles et idoneos homines in dicto loco sive officio, magistri sive pedagogi ac subpedagogi sive hypodidasculi scolæ predictæ, nominare eligere et admittere possint et valeant, possitque et valeat, Et eidem personæ sive eisdem personis quod ipsa vel ipsæ dominia maneria terras tenementa redditus revenc̄oes reversiones servitia et hereditamenta predicta, ad annuum valorem predictum, prefatis maiori ballivis burgensibus et communitati villæ predictæ pro tempore existen., dare concedere legare vel assignare possit aut possint, habendum sibi et successoribus suis sicut predictum est tenore presentium, similiter licenciam dedimus ac damus, specialem absque impedimento impetitione seu gravamine nostri vel heredum aut successorum nostrorum, justiciariorum escaetorum vicecomitum coronatorum ballivorum seu aliorum ministrorum nostrorum, vel heredum nostrorum aut aliorum quorumcunque, et absque aliquibus aliis literis regiis patentibus, aut aliquibus inquisitionibus super aliquo brevi de ad quod damnum vel aliquo alio mandato regio in hac parte quovismodo habend. prosequend. seu capiend. statuto de terris et tenementis ad manum mortuam non ponend. vel extendend. aut portand. aut aliquo alio statuto actu sive ordinatione inde in contrarium fact. edit. sive ordinat., aut aliquâ concessione vel aliquibus concessionibus prefatis maiori ballivis burgensibus et communitati villæ predictæ per nos vel per aliquem progenitorum nostrorum ante hæc tempora fact. in presentibus minime fact. exist. aut aliquâ aliâ re causâ vel materiâ quâcunque in aliquo non obstant. Et hoc absque aliquo fine seu feodo nobis pro premissis seu aliquo premissorum in hanaperio nostro seu alibi reddend. solvend. vel faciend. eo quod expressa mentio de vero valore annuo aut de aliquo alio valore vel certitudine premissorum sive eorum alicujus, aut de aliis donis sive concessionibus per nos seu per aliquem progenitorum nostrorum prefatis maiori ballivis burgensibus et communitati villæ predictæ ante hæc tempora fact. in presentibus

and alderman of the city of *London*, and Dame *Alice* his wife of the other part, after reciting the letters patent, it is witnessed, that the mayor, bailiffs, &c., for and towards the erection of the school, to have continuance, according to the form and effect of the letters patent, did thereby erect, make, found and establish, a free and perpetual school, within the town of *Bedford*, in a messuage there commonly called the Free School House, which Sir *William Harper* of late built; the same school to be of one master and one usher, for ever to continue; and the mayor, bailiffs, &c. then elected and admitted into the office of master of the school, *E. G.*, and into the office of usher *R. E.*; and Sir *William Harper* and Dame *Alice* for the better maintenance of the school did grant enfeoff and assure, unto the mayor, bailiffs, &c., the messuage of Sir *William Harper*, commonly called the School House, &c.; and also thirteen acres of meadow therein described; to hold the same to the mayor, bailiffs, &c., and their successors, for the sustentation of the master and usher of the school, from time to time, for the continuance of the school for ever, for the marriage of poor maids of the town, and for poor children there to be nourished and informed, according to the form of the letters patent; and the mayor, bailiffs, &c. covenanted and granted for them and their successors, to, and with Sir *William Harpur* and Dame *Alice*, their heirs, executors, &c.; that the mayor, &c. and their

sentibus minime fact. exist. aliquo statuto actu ordinatione provisione sive restrictione inde in contrarium fact. edit. ordinat. sive provis. aut aliquâ aliâ re causâ vel materiâ quâcunque in aliquo non obstante. In cujus rei testimonium has literas nostras fiere fecimus patentes. Teste me ipso apud Ely quinto decimo dei Augusti anno regni nostri sexto.

Per Bre. de privato sigillo et de datâ predictâ auctoritate parlia.

COTTON.

successors,

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successors, would employ and bestow all such rents, &c., as they should or might lawfully receive, or raise by reason of the thirteen acres of meadow, to the uses and purposes expressed in the letters patent.

The petition proceeded to state, that by an act of parliament passed in the 33d year of George III., intitled, "An act for repealing an act made in the 4th year of the reign of His present Majesty, intitled, 'An act for enlarging the charitable uses, extending the objects, and regulating the application of the rents and profits of the estates given by Sir *William Harpur*, Knt., and dame *Alice*, his wife, for the benefit of the poor and other objects of charity of the town of *Bedford*,' and for the better management of the said estates, and the rents and profits thereof;" after reciting the letters patent, and the indenture and the act of the 4th of *George* III.; and further reciting, that it was found by experience that the directions given in the last-mentioned act, and the schedule thereto, for the application of the rents and profits of the trust estate and premises, were in some instances very improper, and occasioned many inconveniences to the inhabitants of the town of *Bedford*, and that the premises might be managed, and the rents and profits thereof applied in a manner much more advantageous for the objects of the charity, the recited act, and the schedule thereto annexed, and all the rules, orders, and directions therein mentioned, made or prescribed, were repealed, and declared absolutely void: And it was enacted, that the Lord-Lieutenant, and representatives in Parliament for the time being, of the county of *Bedford*, the mayor, recorder, aldermen, common council, bailiffs, chamberlains and representatives in parliament, for the time being, of the town of *Bedford*, the master and usher of the grammar school for the time being, and eighteen inhabitants of the town, who should be chosen in the manner

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manner thereinafter mentioned, and their respective successors to be chosen in like manner, should be, and were thereby accordingly declared, for ever thereafter, trustees of the several estates and premises belonging to the charity; and should let, demise, and manage the same, and apply the rents, issues, and profits thereof, in such manner as by the rules, orders, and directions in the schedule thereunto annexed, was directed; and after providing for the appointment and election of new trustees from time to time, and for the regulation of their conduct, it was enacted, that the trustees of the charity for the time being should be called by the name of "The Masters, Governors, and Trustees, of the *Bedford* Charity," and should use a common seal, *&c.*, and by such name sue and be sued, *&c.*, and should and might purchase, take, hold, and enjoy, any lands, tenements, or hereditaments, which should be wanted, for erecting thereon any buildings proper and necessary for the use of the charity, without any license or writ of *ad quod damnum*, and the statute of mortmain, or any other statute or law to the contrary, notwithstanding; and it was further enacted, that in case any trustee or trustees should, either while continuing, or after ceasing, to be a trustee or trustees, misconduct himself or themselves in the application of the rents and profits of the charity estates, or in the management of the same, or in not duly accounting for what should come to his or their hands, or in the execution of any of the trusts and authorities vested or to become vested in him or them, by virtue of the act, or should misdemean himself or themselves in any manner whatsoever relating to the charity, or the estate thereof, it should be lawful for His Majesty's Attorney-General, and also any person or persons whomsoever, with the consent of His Majesty's Attorney-General, to prefer a petition or petitions from time to time, as occasion

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might require, to the Lord Chancellor of *Great Britain*, or the Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain*, against any such trustee or trustees, either while continuing or after ceasing to be, such trustee or trustees, and with or without making all or any of the other trustees for the time being, or any other person or persons who had been a trustee or trustees, parties thereto, if the Attorney-General, or such person or persons should so think fit; and the Lord Chancellor, or Lord Keeper, or Lords Commissioners were authorised and directed, to cause the same to be heard in a summary way, and should have full power to direct such person or persons against whom such petition or petitions should be preferred, to be examined in such manner as should be thought fit; for the discovery of the truth of the matter alleged against them in such petition or petitions; and such order or orders as the Court of Chancery should think fit to make therein, or upon hearing thereof, should be observed and obeyed by such person or persons against whom such petition or petitions should be preferred, and be final and conclusive to all persons whomsoever; and the same should and might be enforced by such process as any other order or orders of the said Court; and the costs and expenses to be incurred by every such petition or application, should be paid in such manner, by such parties, and out of such fund, as the Court should direct, provided that any thing therein contained notwithstanding, the trustees appointed, or to be appointed, under that act, their heirs, executors, or administrators, should also be liable to be sued by action, bill, information, or otherwise, as any other trustee or trustees for charitable purposes were liable to be sued in law or equity.

The petition then stated, that by the schedule to which the act referred, it was provided, among other

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other things, that (*a*) there should be applied and distributed yearly, out of the rents and profits of the charity estate, the sum of 800*l.* for the marriage portions of forty poor maids of the town of *Bedford*, of good fame and reputation, in equal shares, at the times and in the manner thereinafter directed; and for that purpose the trustees of the charity should, four times in every year, give three weeks' public notice in the town of *Bedford*, that they intend to meet in the town-hall, to consider of poor maidens to whom portions should be given on their respective marriages; and all poor maidens resident in the town of *Bedford*, and being of the age of sixteen years or upwards, and under the age of fifty years, and desirous of being candidates for such portions, whose fathers, not being certificated persons from parishes out of the town of *Bedford*, should either have been occupiers of one or more house or houses in the town for the space of ten years next preceding their becoming candidates, or should have been born in the town, and have been occupiers of one or more house or houses therein for the space of three years next preceding their becoming candidates, should be at liberty to send to the mayor of the town, or to the churchwardens of the parish wherein they should respectively reside, an account in writing of their Christian and surnames, their ages, the places of their births, and the names of their parents; and that all such poor maidens, not being of bad fame and reputation, who should have given in such account, one week at least before the several times after-mentioned, should be permitted to draw lots on the *Monday* next after *Easter* day, on the second *Monday* after *Midsummer* day, on the second *Monday* after *Michaelmas* day, and on the *Monday* next after *Christmas* day, in every year, for ten sums of 20*l.* each,

(*a*) The Eleventh Article.

on

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on every of such days, and that each of the ten poor maidens, qualified as aforesaid, who should draw the ten beneficial lots on each of the said several days, should be entitled to receive, upon the day of her marriage, 20*l.* for her portion, provided she should marry within two calendar months from the time of drawing such beneficial lot, and provided she should not marry a vagrant or other person of bad fame or reputation: That (*a*) the house, or hospital, which had been already erected for the habitation of poor boys and girls, born and resident within the town of *Bedford*, who were proper objects of charity, together with the offices and outbuildings should, from time to time, be upheld, maintained, and kept in good and sufficient order and repair; and that so many of such poor boys and girls should be taken into the said house, monthly, or oftener, as the trustees for the time being, assembled at any general meeting, or the major part of them so assembled, should, from time to time, think proper; which boys and girls should be provided with such proper and suitable nourishment, bedding, clothes, linen, and other necessaries, and with proper nurses and other assistants to take care of them, until they were of a proper age to be put out to trade, agriculture, or other business, in the manner thereinafter mentioned; and in the mean time should be employed in framing, knitting, and spinning wool, or in any other branch of manufacture, in such manner as the trustees assembled, &c. should, from time to time, order and appoint; and that the expenses of keeping the house, &c. in repair, and the wages of nurses and other persons necessary and proper to be employed for the purposes mentioned in the order; and also the expenses of laying in provisions, furniture, clothes, linen, and

(*a*) The fifteenth article.

other

other necessaries; and of providing wool and other commodities for keeping the boys and girls to work, should be regulated and paid out of the rents, &c. of the charity estate, in such manner as the trustees assembled, &c. should direct, so as the same did not exceed the yearly sum of 300*l.*, exclusive of taxes and expenses of repairs, and that there should be at least twenty-six children in the hospital: That (*a*) the sum of 700*l.*, further part of the rents, &c. of the charity estate, should, yearly, by two half yearly sums of 350*l.*, be applied in placing out twenty poor children apprentices every half year, viz. fifteen boys, not being under the age of thirteen nor above the age of fifteen years, and five girls, not being under the age of twelve nor above the age of fifteen years, whose respective fathers not being certificated persons from parishes out of the town of *Bedford*, should either have actually been occupiers of one or more house or houses in that town, for the space of ten years next preceding their children being so apprenticed, or have been born in the town, and been occupiers of one or more house or houses therein for the space of three years then next preceding; and that all such poor boys and girls respectively qualified, whose names should have been given in either to the mayor of the town, or to the churchwardens for the time being of the parish in which their fathers should respectively reside, one calendar month before the respective times of drawing lots after-mentioned, should be permitted to draw lots on the second *Tuesday* after *Michaelmas* day, and the second *Tuesday* after *Lady Day* in every year; and that the sum of 20*l.* should be paid, as the apprentice fee, with each of the fifteen boys, and 10*l.*, as the apprentice fee, with each of the five girls, who should draw the beneficial lots, upon their being respectively placed out ap-

(*a*) The sixteenth article.

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prentices, within the space of two calendar months after they should have drawn such beneficial lots, to masters and mistresses of good character and responsibility, to be approved by the trustees assembled, &c ; and that the boys should be bound for the space of seven years, and the girls for the space of five years; and that the girls should be apprenticed to such trades or occupations only as women usually follow, (lace making only excepted); and if, upon any of the days appointed for drawing lots, the full number of fifteen boys, qualified as aforesaid, should not become candidates, an additional number of beneficial lots should be drawn for by the girls who should offer themselves as candidates, so that twenty beneficial lots might be drawn for every half year: That (*a*), in case any of the poor children who should draw beneficial lots, should die, or be otherwise disposed of, or not be put out apprentices within six calendar months from the time of drawing, (unless the same should happen by default of the trustees, or be prevented by some inevitable accident) the money intended for such child or children should be drawn for again at some of the subsequent days appointed for drawing lots, and be applied for the benefit of such child or children as should become entitled thereto by the drawing a beneficial lot: That (*b*) such of the poor boys qualified as aforesaid who should, upon any of the days mentioned in the sixteenth order, have drawn the unsuccessful lots, should have the preference at the next succeeding day or days appointed for drawing lots for the apprenticing money, and should be entitled to the sum of 20*l*., to be paid upon their being respectively put out apprentice, in preference to those boys who should afterwards apply: That (*c*) every boy and girl so put out apprentice, who should actually serve the

(*a*) The seventeenth article.
(*b*) The eighteenth article.
(*c*) The nineteenth article.

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the full term of apprenticeship, and in all respects comply with the tenor of the indentures of apprenticeship, should, on producing to the trustees of the charity assembled, &c., within three calendar months after the expiration of their respective apprenticeships, a certificate, signed by their respective masters or mistresses, and by the minister and churchwardens of the parish where they should have respectively served their apprenticeship, testifying such actual service and compliance with the tenor of their indentures, as well as their good morals and behaviour respectively, or on producing such other proof thereof as the trustees, so assembled, should require, but not otherwise, be entitled to receive such sum of money, not exceeding 20*l.*, nor less than 10*l.* each, as the trustees, so assembled, should judge proper and expedient; and such trustees should direct the payment thereof accordingly.

The petition proceeded to state, that the petitioner, *Joseph Lyon*, was of the Jewish persuasion, and had constantly been, for the space of twenty-one years last past, and was then, the occupier of a house in the parish of *St. Cuthbert*, in the town of *Bedford*; and that, on the second *Tuesday* after *Michaelmas* day 1816, the petitioner *Sheba Lyon*, one of his daughters, being then between twelve and fifteen years of age, viz. at the age of fourteen years and four months, and being duly qualified according to the act of Parliament, and her name having been given in in the usual form one calendar month before the time of drawing lots, as directed by the act, presented herself to the masters, governors, and trustees of the *Bedford* charity, as a candidate to draw a lot for the apprentice fee to be paid to girls; That the masters, &c. then refused to permit *Sheba Lyon* to draw a lot, alleging as a reason for such refusal that

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the petitioner *Joseph Lyon* was of the Jewish persuasion: That since that refusal, the Masters, &c. had come to a resolution or agreement, not to permit any persons of the Jewish persuasion, whatever in other respects may be their qualifications under the terms of the act of parliament, or the children of such persons, to partake of any benefit under the *Bedford* Charity: That *Samuel Lyon*, the son of the petitioner *Joseph Lyon*, was many years since admitted into the Free School of the *Bedford* Charity, and about six years since, was permitted to draw lots for the apprentice fee to be given to boys, but did not draw a beneficial lot; in consequence whereof, at the next succeeding day appointed for drawing for the apprenticing money, being entitled under the act of parliament to a preference, he received the apprentice fee from the trustees: And that about two years since, *Elizabeth Lyon*, the eldest daughter of the petitioner *Joseph Lyon*, was permitted to draw lots for the apprentice fee to be given to girls, and drew a beneficial lot, and was bound apprentice accordingly.

The petition farther stated, that the petitioner, *Michael Joseph*, was of the Jewish persuasion, and had constantly been for thirty years past, and was then the occupier of a house in the parish of *St. Paul*, in the town of *Bedford*, and that *Joseph Joseph* and *Nathaniel Joseph*, his two sons, were admitted to the free school of the charity, from their respective ages of eight years, until they respectively drew lots for, and received, the apprentice fee to be given to boys, and were both bound apprentice to the petitioner *Michael Joseph*, in his trade of a silversmith, by the Masters, &c. of the charity, and the eldest son was bound apprentice at *Michaelmas* 1810, and having served his apprenticeship, and produced a certificate pursuant to the directions of the

act,

act, received the sum of 10*l.* from the Masters, &c., at the meeting held on the second *Tuesday* after *Michaelmas* 1817; that the three eldest daughters of the petitioner *Michael Joseph*, were respectively admitted to draw lots for the apprentice fee to be given to girls, but did not draw beneficial lots, and that at the times of their respective marriages, they received the marriage portions to be given to poor maids; and the fourth daughter of the petitioner *Michael Joseph* received both an apprentice fee and marriage portion; that the petitioners had made application to the masters, governors, and trustees of the *Bedford* charity, to admit the petitioner *Sheba Lyon* to draw lots for the apprentice fee to be given to girls, and to permit persons of the Jewish persuasion, poor inhabitants of the town of *Bedford*, duly qualified in other respects, and their children, to partake of the benefit of the *Bedford* charity, and that *John Wing*, the mayor of the town of *Bedford*, in answer to an application made to him for such purposes by the petitioner *Isaac Lyon Goldsmith*, wrote a letter to the last named petitioner, dated the 5th of *January*, 1818, informing him, that although the children of the petitioner *Michael Joseph* had been allowed the benefit of the charity without objection, yet the trustees finding the number of Jews increasing in *Bedford*, entertained considerable doubts whether such persons were objects of the charity, and that they had been advised to refuse, and had refused, to admit Jews to participate in the benefit of the charity, leaving it to the persons so refused, if they should think proper, to bring the matter before the Lord Chancellor.

The petition then stating the act of the 52d year of *George* 3. (*a*), entitled, an act to provide a sum-

(*a*) C. 101.

mary

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mary remedy in case of abuses of trusts created for charitable purposes, and that by virtue of the said acts of Parliament, or one of them, the petitioners were entitled to relief in the premises, prayed that it might be declared that the poor inhabitants of the town of *Bedford* in other respects duly qualified, are entitled to the benefit of the *Bedford* charity for themselves and their children, whether they are Jews or Christians, and that the masters, governors, and trustees of the *Bedford* charity might be ordered to permit *Sheba Lyon* to draw lots for the apprentice fee to be paid to girls, in pursuance of the act of parliament, and in case she should draw a beneficial lot, that the masters, &c. might be ordered to pay the apprentice fee to her.

July 31.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*, in support of the petition.

This petition is presented by persons immediately interested in the charity, and by other respectable individuals, not interested, who consider it their duty to support the claims of those of their persuasion to benefits which, after having been long enjoyed, are recently denied to them. It is clear that Jews may be objects of this charity. The clause requiring attendance at some place of religious worship every *Sunday* (*a*), is indeed not literally applicable to Jews, but it implies an intention not to confine the charity to persons of the established religion; the design was, to require some form of religion; and the Court will not, from that single clause, which certainly comprehends

(*a*) *Post*, p. 501.

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Roman Catholics, infer the exclusion of Jews. The expression in the eleventh rule, "Christian name," was designed merely to secure a statement of the *prænomen*, though not imposed with the ceremony of baptism. The certificate required from apprentices concerns moral conduct only, not religious ceremonies.

The apprehensions entertained by the trustees of an undue accession to the numbers of foreign Jewish inhabitants of *Bedford*, if well founded, may be better removed by an extension of the term of ten years' residence, at present required in inhabitant householders, to qualify their children as objects of the charity, than by a regulation affecting religion. No sufficient reason is assigned to justify the trustees in establishing a distinction to the disadvantage of persons conscientiously following the faith of their ancestors. It must be argued, that, if there were no objects of the charity except Jews, the fund should be applied to other purposes, rather than for their benefit.

The particular regulations of this charity not excluding Jews, the trustees must maintain a general proposition, that Jews cannot claim a benefit under any charity. Our law recognises no such rule. The decision of Lord *Hardwicke* in *De Costa* v. *De Paz* (*a*) establishes only that

(*a*) *Amb.* 228. 1 *Dick.* 258. 2 *Ves.* 274. 276. 7 *Ves.* 76. 2 *Jac.* & *Walk.* 308. The following note of that case, which supplies many deficiencies in the printed reports, is extracted from Mr. *Coxe's* MSS.

A bequest for the maintenance of an assembly for reading the Jewish law, and advancing the Jewish religion, is illegal.

"De Costa, *v.* De Paz.
Michs. 17 *Geo.* 2.

"The questions in this case arose upon the will of one *Elias de Paz*, who thereby directed his executors to invest a sum of 1200*l.* in some govern-

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that a bequest for the propagation of the Jewish religion is void, not that persons of that persuasion cannot be objects

government or other security; and directed that the revenue arising therefrom should be applied for ever in the maintenance of a *Jesiba*, or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion; and directed that his executors, during their respective lives, should have the management the assembly, and appointed *A. B.* and *C.* his residuary legatees; and the bill was to have this 1200*l.* laid out according to the will.

" The Lord Chancellor upon the opening asked, if there had ever been a case where such a charity as this had been established, for it being against the Christian religion, which is part of the law of the land, he thought he could not decree it.

" Mr. *Clark* said, that no cases could be found antecedent to the act of toleration, (*a*) where a bequest of this kind had been established; yet since that act, by which sects differing from the established religion are by law tolerated, there may be some instances; but the present case is of a sect that can only be said to be connived at; that it may therefore become material to consider whether this bequest will not come within the statute of *Edward* the 6th of superstitious uses, (*b*) and whether there are not some vesting clauses in the statutes concerning superstitious uses, that may give this legacy to the crown.

" *Ryder*, Attorney General. The Act of Toleration gave no new right to sectaries, but only took away the effect of the penal laws, and gave people liberty of worshipping God their own way. Before the Revolution there were cases that have not been received since, particularly *Baxter*'s case. (1 *Vern.* 248. revised after the Revolution, 2 *Vern.* 105.) (*c*). How is the present case? It is only for propagating and reading that law which is allowed in our church, and which is the foundation of the Christian religion. By the toleration a liberty was at last given to

(*a*) 1 *W.* & *M.* c. 18.

(*b*) 1 *Ed.* 6. c. 14.

(*c*) See 7 *Ves.* 76.

these

jects of a charitable institution. The highest authority which we acknowledge instructs us, that difference of faith

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these people. By the statute of *Edward* the 6th, superstitious devises of lands and personal estate are not made void, but come to the crown, and this court has considered the statute as making a gift to the crown; and therefore that might be the foundation of the first determination in *Baxter*'s case: there could be no other ground for it.

Mr. *Noel*, for the residuary devisees, insists that this bequest is absolutely void; as being in opposition to the Christian religion, and for establishing the Jewish; and that it cannot take effect to vest in the crown as a devise to a superstitious use, because it is not so; and therefore as it is part of the will that cannot be performed, it falls into the residuum, and must go to the devisees of that.

The cases before the revolution where the crown interposed, were a great strain on the power of the crown, and not approved by the court, and could be on no other foundation than as vested in the crown as a bequest to a superstitious use.

Ld. *Hardwicke*, Chancellor. This case requires two considerations; 1st. Whether the legacy in question is good, and such as this Court can or ought to establish? and, 2dly. If not, whether it is void absolutely, or only to the particular intent, so as to leave it a general legacy, and such as the crown may dispose of? As to the first, I am of opinion that it is not a good legacy, and ought not to be established, no such instance being found. Nobody more against laying penalties or hardships upon persons for the exercise of their particular religion than I am; but there is a great difference between doing this and establishing them by acts of the Court. The cases of dissenting ministers before the Toleration were different; particularly *Baxter*'s case, was not of an illegal bequest, but was a bequest for poor ejected ministers: and even as to this case of the Jewish religion, it would be for a different consideration, were it for the support of poor persons of that religion. Orders are made by me and the Master

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faith should not exclude a brother in distress. Where admission to institutions requires subscription to certain articles,

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A bequest for the support of poor Jews is valid.

ter of the Rolls, every year, upon petitions for their support, as poor people. But this is a bequest for the propagation of the Jewish religion; and though it is said, that this is a part of our religion, yet the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord *Hale* and Lord *Raymond* (*a*); and it undoubtedly is so; for the constitution and policy of this nation is founded thereon. As to the Act of Toleration no new right is given by that, but only an exemption from the penal laws. The Toleration act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the dissenters under certain regulations and tests. This renders those religions legal (*b*), which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the legislature.

Christianity is a part of the law of *England.*

Effect of the act of toleration.

The Jewish religion not legal, but connived at.

"But the second question is more doubtful, as to what will be the consequence of my opinion upon the first? The objection is, that this is a superstitious use, and so that the bequest must go to the crown; but in answer to this it is said, that that can only be in cases that are within the statute of Edward 6. But the cases have gone further; and in *Baxter*'s case it is said, that the Court hath taken in charities *in eodem genere*, and though this decree was reversed, yet it was on the general point that the bequest was not illegal. (*c*) And there is another case to this purpose, which is, the *Attorney General* and *Guise*, 2 *Vern.* (*d*), where the case of one *Combes* is mentioned, which was before the

(*a*) *Taylor's case*, 1 *Vent.* 293. 3 *Keb.* 607. 621 *Woolston*'s case, *Fitzg.* 64. 2 *Str.* 834. *Vide post, p.* 527.

(*b*) See *Harrison* v. *Evans*, 2 *Burns. E. L.* 207. 220. *Furneaux* Letters to *Blackstone*. App. *Rex* v. *Barker*, 3 *Burr.* 1265. 1 *Bl.* 300. 352. *Attorney-General* v. *Pearson* 3 *Mer.* 353.

(*c*) 7 *Ves.* 76.

(*d*) P. 266.

Toleration

articles, a person declining to subscribe is disqualified, not by his principles, but by the omission of the ceremony.

The *Solicitor General*, for the trustees, suggested a doubt whether the warden and fellows of new college, expressly appointed visitors of the grammar school, were not also visitors of other parts of the charity; and insisted that the question depended on the intention of the founder, the act of parliament not extending to any class of persons not originally comprehended within the letters patent.

The Lord Chancellor.

It is indispensable to see the letters patent, from which alone can be collected the objects of the charity,

Right of the crown under a devise to a superstitious use.

Toleration Act; and there such bequest was held not void. But if this is to be considered as a superstitious use, it would be a proper consideration for a court of revenue; for I do not think the crown is obliged to apply a bequest to a superstitious use to a charity. If it be an illegal bequest, then it is another consideration, and the Court may direct the application. Therefore, upon this part of the case I have great doubt, and all I shall do at present is, to direct the money to be paid into the bank, and shall reserve the determination as to the disposition of it for further consideration." — Mr. *Coxe*'s MSS. "As to the said legacy of 1200*l.* given by the said will towards the establishing a *Jesiba*, or assembly for reading and improving the Jewish law, his Lordship declared, that he was of opinion, that the same was not good in law, and ought not to be decreed or established by this Court; but doth reserve the consideration, whether the said sum of 1200*l.* ought to fall and accrue to the residue of the said testator's personal estate, or be applied to any other, and what use, &c." 6th *December* 1743. Reg. Lib. A. 1743, fol. 94.

referred

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referred to by the recital in the act. The Court must also be informed whether it does or not appear on the records of the charity, that a Jew has ever voted in the choice of trustees, or been elected trustee, or educated in the grammar school, or apprenticed, or admitted into the alms-houses; and whether any of the poor maidens who have received marriage portions have been Jewesses. In deciding whether Jewesses can be entitled to the benefit of those portions, the Court must recollect what will be the effect of that decision on all the other provisions. My present opinion is, that the warden and fellows of new college, are visitors of the grammar school only.

Affidavits were afterwards filed in support of the petition, and in opposition to it.

The affidavits of *Michael Joseph*, *Joseph Levi*, and *Godfrey Levi*, in support of the petition, stated, that since the petitioner *Michael Joseph* became a resident householder at *Bedford*, he had twice voted in the annual election of trustees of the charity, once when such elections used to take place at the old town-hall, which had been pulled down upwards of twelve years, and once at the sessions house, where the elections had been since held; that on occasion of his last voting, he was solicited so to do by Mr. *J. C.*, one of the present trustees, and an alderman of the town of *Bedford*; and that he had been at several other times solicited to vote in the election of trustees, but had declined so doing in consequence of its being inconvenient to him to be at *Bedford* at the time of the elections; that he settled at that town and became a housekeeper there, about thirty-one years ago, and at that time there was no other person professing the Jewish religion there, nor had been, in the memory of man; that he had had two sons and

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and seven daughters, all of whom were born in *Bedford*, and then living, and that both his sons were admitted into the free school of the charity, and were educated there in the usual manner, his eldest son being in the lower or writing school, and his youngest son both in the grammar and writing school, and both of them drew for and received apprentice fees from the charity, and the eldest, on being out of his apprenticeship, and on production of the certificate required by the act, received the benefaction of 10*l.*; that his four eldest daughters drew for apprentice fees given to girls, the three eldest of them did not draw beneficial lots, but the youngest having drawn a beneficial lot, the apprentice fee was paid with her: that all his daughters had since claimed and received the marriage portions given to poor maidens; that the eldest of his three youngest daughters had twice drawn for the apprentice fee, namely at *Michaelmas* 1814, and *Lady Day* 1815, but drew unsuccessful lots on both occasions; that no Jew had ever been proposed or elected a trustee of the charity; but that such trustees had always been elected from among the most opulent and considerable inhabitants of the town; and no Jew, during the time of *Michael Joseph*'s first residence there, had been, by his circumstances and mode of living, entitled to the distinction of being elected a trustee: that no Jew boy or girl had ever been admitted into the hospital, nor any Jew into the alms-houses belonging to the charity, and that no Jew girl ever received the donation given to maid servants, and no Jew ever received any part of the monies distributed annually under the provisions of the act, among the poor inhabitants of *Bedford*; but that no one professing the Jewish religion since *Michael Joseph*'s residence in the town, or at any time preceding, as he believed, had ever applied for, or been a fit object to partake

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partake any of those benefactions, (in as much as no Jew had been incapacitated by age or infirmity, so as to fall within the description of persons for whose benefit the alms-houses were erected,) or to receive the surplus of the charity funds annually distributed; and no Jew girl, the daughter of an inhabitant of *Bedford*, had ever gone out to service; that there were then three Jew housekeepers in the town, and no more, and that since *Michael Joseph* first came to reside in the town, there had been four other Jew families resident as housekeepers there, all of whom had either left the town, or ceased to be housekeepers therein.

The affidavits farther stated, that *Godfrey Levi*, resident at *Bedford*, had four daughters and a son, of whom the two eldest daughters were received at the preparatory free school belonging to the charity, at its first erection in 1816, and continued there for a considerable time, until he thought proper to remove them, and place them in another school; and that the youngest daughters of *Michael Joseph* and *Joseph Lyon* were admitted into the preparatory school, but had since been removed by them.

The affidavits of *John Brereton*, clerk, doctor of civil law, master of the free grammar school, *William Massey*, master of the writing school, and *John Furze*, master of the hospital for the nourishment of poor children, and of the *Harpur* preparatory school, filed in opposition to the petition, stated, that in *January* 1811, Dr. *Brereton* was appointed, by the warden and fellows of *New College*, *Oxford*, master of the free grammar school, upon the death of the late master; that soon after his appointment, certain regulations for the management of the school were made and approved by the warden and fellows,

lows, and also by the masters, governors, and trustees, and by Dr. *Brereton*, which were printed and distributed in the town of *Bedford*, and a copy, painted on boards, placed in the school, and the school had ever since been, and still was, conducted agreeably thereto; that each boy attending the grammar school was required to learn, and was instructed in, the Latin language, and so soon as he had made sufficient progress therein, he was required to learn, and was instructed in, the Greek language, and in reading the Greek Testament, and the works of such Latin and Greek authors as were usual in public schools, and the boys were divided into classes as usual in such schools; that every boy was also instructed in the principles of the Christian religion, and required to read the Bible and New Testament; that on Dr. *Brereton*'s entrance on the duty of master of the grammar school, in 1811, he found *Nathan Joseph*, the son of *Michael Joseph*, one of the scholars in that school; that *Nathan Joseph* (who also attended the writing school) never made further progress than learning the Latin grammar, and remained altogether not more than twelve months in the school, when his father took him away; that *Michael Joseph* requested Dr. *Brereton* to dispense with *Nathan Joseph's* attendance in school at the time of morning and evening prayer, on account of its being inconsistent with his faith as a Jew, and for the same reason to dispense with his attendance on the *Saturday*, being the Jewish *Sabbath*, and also on the Jewish holidays; that *Nathan Joseph* never attended the grammar school on a *Saturday*, nor on certain other days which were Jewish holydays; that he was very irregular in his attendance in school, of which Dr. *Brereton* frequently complained to *Michael Joseph*, who uniformly described his absence to be of necessity, on account of his being of the Jewish persuasion; that no boy of the Jewish persuasion, except *Nathan Joseph*, had

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had at any time applied for admission, or been admitted, into the grammar school, during the time Dr. *Brereton* had been the master thereof: that all the boys in the writing school, without exception, were educated in the principles of Christianity, and taught to read, and actually read, the Bible and New Testament, and learn and repeat the Church Catechism; that no boy of the Jewish persuasion had applied for admission, or been admitted, into that school, during the time *W. Massey*, who was appointed in *December* 1814, had been the master; that, in *June* 1815, the masters, *&c.* founded a school for instructing the poor boys of the town upon Dr. *Bell's* system of education, by the name of a preparatory school, and *John Furze*, master of the hospital for poor children, was appointed master; that no Jew boy had ever been educated in the preparatory school; that on the afternoons of *Tuesday* and *Thursday*, in each week, being the half holydays of the boys, the school was opened for the education of girls residing in the town, in reading, writing, and arithmetic, from two till four; that two daughters of *Michael Joseph*, three daughters of *Joseph Lyon*, and two daughters of *Godfrey Levi*, came to the preparatory school, for education, on the *Tuesday* and *Thursday* afternoons, for about six months; that the two daughters of *Michael Joseph* informed *Furze*, that, being Jewesses, they were not allowed to read the New Testament, and he permitted them to read the commandments and the Bible only; that the children of *Joseph Lyon* and *Godfrey Levi*, being little children, were, on the above afternoons, put, with children of the same class, to read the parables and miracles of the New Testament; that all the Jew children staid away from the school on certain days, which were Jewish holidays, and neither of the Jew children remained in the school more than six months, when they entirely ceased to attend, except *Sheba Joseph*, who remained upwards of twelve months.

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The affidavit of *John Whitehouse*, clerk to the masters, &c. of the charity, stated that he was of the age of forty-eight years, and a native of *Bedford*, out of which he had never resided for six months together; that he never knew or heard of any Jew residing in the town before *Michael Joseph* came to reside therein, about thirty years ago, since which time other Jews had come to reside there; and that in *November* 1799 he was appointed by the masters, &c. to take the management of the *English* or writing school of the charity, the then master being incapacitated by age, and upon his decease in 1803, the deponent was appointed master; that during the time he officiated, the boys in the school were severally instructed in the principles of the Christian religion, and read the Bible and New Testament, and learned and repeated the Church Catechism; that no boy of the Jewish persuasion was ever admitted into the school for education before the deponent officiated as master, and the only boys of the Jewish persuasion who were admitted whilst he was master, were *Joseph Joseph*, eldest son of *Michael Joseph*, and *Lemuel Lyon*, son of *Joseph Lyon*; that *Michael Joseph*, on occasion of his son's admission, requested that *Joseph Joseph* might not be desired to attend the morning and evening prayers on account of his religion; that the deponent did not dispense with *Joseph Joseph*'s attendance, but permitted him to sit instead of kneel during such prayers; that at the request of *Michael Joseph*, the deponent permitted *Joseph Joseph* to be absent from school every *Saturday*, being the Jewish *Sabbath*, and also on such days as were Jewish holydays; that *Lemuel Lyon* was also absent every *Saturday*, and on the Jewish holydays; that neither *Joseph Joseph* or *Lemuel Lyon*, on account of their religion, ever read the New Testament, or learned the Church Catechism, as all the other boys did; that in *July* 1809 the deponent was appointed by the masters,

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&c. to be their clerk, and thereupon vacated the mastership of the *English* writing school; that *Rosma Joseph*, a daughter of *Michael Joseph*, drew for and received the marriage portion on the 6th of *January* 1808, and that *Elizabeth Joseph*, *Mary Joseph*, and *Hannah Joseph*, three other daughters of *Michael Joseph*, had also since drawn for and received the marriage portions; that *Hannah Joseph* and *Joseph Joseph* drew for and obtained the beneficial lot to be bound apprentice, and were severally with the consent of the masters, &c. bound apprentice to their father, *Michael Joseph*; that *Nathan Joseph*, the other son of *Michael Joseph*, also drew for and obtained the beneficial lot, and was with the like consent bound apprentice; and *Joseph Joseph*, on a certificate of faithful service, received the usual benefaction of 10*l.*; that *Lemuel Lyon* and *Elizabeth Lyon*, children of *Joseph Lyon*, had also respectively drawn for and obtained the beneficial lot, and had been bound apprentice; that no Jew had ever been proposed or elected a trustee of the charity, and that no Jew, except *Michael Joseph*, had ever ballotted on the election of any trustee; that no Jew girl had ever received any portion, or donation, as a maid-servant, or on going to service; that no Jew boy or girl had ever been admitted into the hospital; that no Jew had ever received any part of the monies distributed annually for the relief of poor decayed housekeepers, and other proper objects, or been admitted in any alms-house of the charity, or otherwise partaken of the charity, except as before set forth.

The regulations for the management of the school annexed to Dr. *Brereton*'s affidavit, contained, among others, the following articles: — "4. Prayers will be read every morning before breakfast, at the commencement of the school-time, and at the end of it every evening.

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ing. 5. Every boy will be expected to attend most punctually at the above stated hours (specified in the third article) with his lesson and exercises prepared. Names will be called over at the commencement, and the close of every school-time, and boys absenting themselves from morning prayers, without a sufficient reason sent to the master in writing by their parents or guardians, will, after due admonition and correction, be liable to be expelled by the master. 6. Saints' days, and every *Saturday* afternoon, will be fixed holydays."

The following clauses of the act of 33 *Geo.* 3. were, in addition to those stated by the petition, the subject of observation in the argument and judgment. The clause regulating the election of trustees directed, that they should be inhabitants of the town of *Bedford*, who had resided there for three years, and be seised of, or entitled to, a freehold of the yearly value of 10*l.*, or occupy a house in the town of the yearly value of 15*l.*, chosen annually by inhabitants paying scot and lot.

The trustees were required, before they acted, to take and subscribe an oath, or, being one of the people called Quakers, a solemn affirmation, of their qualification, and faithful performance of the duties of the office; and a subsequent clause directed, that the monument and statue of the founder should be supported and kept in repair from the rents of the charity. It was also enacted, that if any of the provisions or regulations of the act should at any time prove inconvenient or impracticable, or if any doubts, disputes, or difficulties, should arise, touching the application of the rents and profits of the charity estates, or the construction of any of the rules, orders, and directions, contained in the schedule, or afterwards made by the trustees, it should be lawful for the trustees, or any eight or more of them, to prefer a peti-

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tion to the Lord Chancellor, or the Lord Keeper, or the Lords Commissioners of the Great Seal, who were thereby authorised and directed to cause the same to be heard in a summary way, and such order as the Court of Chancery should think fit to make therein, or upon the hearing thereof, should be final and conclusive; and the costs and expenses to be incurred by every such petition should be paid out of the rents and profits of the charity estate.

The third article of the schedule directed, that, at the school, all the children who should resort thereto for education should be instructed in grammar, reading, writing, and other useful learning, and good manners, in such manner as the warden and fellows of *New College, Oxford*, the visitors of the grammar school, and the trustees for the time being of the charity, assembled at a general meeting, or the major part of them, should direct. The fifth article required the master and usher to be fellows of *New College*, or clergymen of the Church of *England*, appointed by the warden and fellows of *New College*. The ninth article directed the warden and fellows of *New College*, on the first *Thursday* in every *May*, to send two sufficient visitors to the grammar school, who should publicly examine the boys in their learning, and, as visitors, examine into the conduct of the master and usher, and also into all faults and neglects respecting the school, and make a report thereof to the warden and fellows. The fourteenth article directed the residue, if any, of the annual sum of 800*l.*, applicable under the eleventh article (*a*), to be distributed amongst such poor maid-servants, not being of bad reputation, then resident in *Bedford*, as should have been in service there five years, and should have been married

(*a*) *Ante*, p. 479.

within

within one year before such distribution. The thirty-first article, directing the erection of alms-houses, for the reception of ten poor old men and ten poor old women, housekeepers of *Bedford*, with certain allowances, required the persons inhabiting the alms-houses, if able, to go every *Sunday* to some place of public worship, in *Bedford*, on pain of liability of removal, for neglect of attendance, or other misbehaviour.

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The *Solicitor General*, Mr. *Phillimore*, and Mr. *Shadwell*, against the petition. *Aug.* 7.

To entitle themselves to the relief sought, the petitioners must show, that, at the date of the foundation of this charity, Jews might have claimed the benefit of it. That proposition is confronted by the most decisive authorities. In the reign of *Edward* the Sixth, for many centuries preceding, and for more than a century following, Jews were aliens in the strictest sense of the term; though born in this country, yet professing Judaism, the law distinguished them as alien enemies. Such is the doctrine of *Calvin*'s case; and though the terms in which it is expressed may not sound decorous to modern ears, the Court will recollect that that case was argued before the twelve judges, assisted by the Lord Chancellor; and Sir *Edward Coke* remarks the singular unanimity of the decision. (*a*) The principle thus establised by the highest legal authority is this: "All infidels are in law *perpetui inimici*, perpetual enemies, (for the law presumes not that they will be converted, that being *potentia remota*, a remote possibility,) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace — 2 *Cor*. vi. 15.

(*a*) 7 *Co*. 28., but the passage cited is merely a *dictum* of *Coke*.

Quæ

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Quæ autem conventio Christi ad Belial, aut quæ pars fideli cum infideli: and the law saith, — Judæo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere — Register, 282. (*a*) Infideles sunt Christi et Christianorum inimici. And herewith agreeth the book in 12 *Hen.* 8. fol. 4. (*b*), where it is holden that a pagan cannot have or maintain any action at all." (*c*) In

(*a*) A writ of protection granted to the prior and brethren of the hospital of St. *John* at *Jerusalem*, in which the hospital is described as founded for the defence of the church against the enemies of *Christ* and of Christians.

(*b*) A *dictum* of *Brook Justice*.

(*c*) 7 *Co.* 17. See 4 *Inst.* 155. *Michelborne* v. *Michelborne*. "Upon a motion made for consultation upon prohibition awarded: It was said by the Lord *Coke*, that no subject of the king may trade with any realm of Infidels, without licence of the king, and the reason of that is, that he may relinquish the Catholic faith and adhere to infidelism; and he said that he hath seen a licence made in the time of *Ed.* 3., where the king recited that he, having special trust and confidence that his subject will not decline from his faith and religion, licensed him (*ut supra*); and this did rise upon the recital of a licence made to a merchant to trade into the *East Indies*." 2 *Brownlow* and *Goldesb.* 296. Some important remarks on the authority of these *dicta* may be found in *Pollexfen*'s arguments in *The case of Monopolies, East India Company* v. *Sandys.* 10 *Howell*'s State Trials, 440, 441. For farther comments *vide post*, p. 512. *et seq.* In *Ramkissenseat* v. *Barker*, "The exception of the plaintiff being a Pagan was taken, but on argument, over-ruled." 1 *Atk.* 19., and see a pamphlet, imputed to *P. Carteret Webbe*, Esq., entitled, "The question, whether a Jew, born within the *British* dominions, was, before the making the late act of parliament, a person capable by law, to purchase and hold lands to him and his heirs, fairly stated and considered," *London*, 1753, p. 35. "A Jew

In his Commentary on *Littleton*, Lord *Coke* states this case: "A Jew born in *England*, taketh to wife a Jewess born

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Jew brought an action, and the defendant pleaded that the plaintiff is a Jew, and that all Jews are perpetual enemies *regis* and *religionis*. Judgment *si actio*. *Curia*, a Jew may recover as well as a villein, and the plea is but in disability so long as the king shall prohibit them to trade; and judgment was given for the Plaintiff." *Mich.* 36 *Car.* 2. in *B. Regis*. 1 *Lilly Pract. Register* 3. The question, &c. p. 41., So *Wells* v. *Williams*, 1 *Lord Raym.* 282. *De Costa* v. *De Paz*, *ante*, p. 487. n., *Villareal* v. *Mellish*, *post*. p. 533., and many other cases, particularly *Lindo* v. *Belisario*, 1 *Haggard's* Reports, 216., and Appendix, *D'Aguilar* v. *D'Aguilar*, *Id.* 134. n. *Goldsmid* v. *Bromer*, *Id.* 324. In *The Nabob of Arcot* v. *the East India Company*, 3 *Bro. C. C.* 292., 1 *Ves. Jun.* 371., 12 *Ves. Jun.* 56., the suit was sustained by an alien infidel.

In *Osborne's* case, *Pasch.* 51 *Geo.* 2., "Information was prayed for publishing an account of a murder, committed by several Jews, lately arrived from *Portugal*. Chief Justice objected that the generality of the reflection made it difficult to say who are the persons meant by the paper; *Fazakerly* answered, that by proper averments in the information the persons reflected on might be easily discovered, as in *Franklin's* case, though the word ministers only was used in the libel, yet by suitable averments in the information, and proof made of them to the jury, they found those ministers of state to his present Majesty, and the Defendant guilty.

Trin. 6 *Geo.* 2.

Information for a misdemeanor in the publication of a paper, accusing certain Jews of murder.

The paper on which the information was prayed, contained an account of a murder committed on a Jewish woman and her child, by certain Jews, lately arrived from *Portugal*, and living near *Broad Street*, because the child was begotten by a Christian, and the affidavits set forth that several persons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broad Street*, were attacked by multitudes in several parts of the city, barbarously treated and threatened with death, in case they were found abroad any more.

Strange

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born also in *England;* the husband is converted to the Christian faith, purchaseth lands, and enfeoffeth another, and dieth; the wife brought a writ of dower, and was barred of her dower; and the reason yielded in the record is this: Quia vero contra justitiam est quod ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione suâ nolit cum eo adhærere, et cum eo converti." (*a*)

In the earlier periods of English history the kings of *England* exercised a peculiar jurisdiction over the Jews:

Strange showed cause against the information, and that it could not be granted as for a libel, because it not appearing who the persons reflected upon are, no judgment can be given for the king; as in *King* v. *Orme Trin.* 11 *W.* 3. (*b*) where an indictment was exhibited for a libel, called The Ladies' Invention, and alleged to be to the scandal of several ladies unknown; and after verdict *pro Rege,* judgment was arrested, because it did not appear who the persons reflected on were.

Sed per Cur. Admitting an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible." MSS. and see *Anon.* 2 *Barn.* 138. The *King* v. *Osborne,* 2 *Barn.* 166.

(*a*) *Co. Litt.* 31 b. See *Jenk.* 3 marg. *Tovey, Anglia Judaica,* p. 230. *Molloy de Jure Maritimo,* lib. 3. c. 6. s. 11.; but "a Jew's wife might have dower or thirds out of her husband's credits and chattels." — *Madox,* Exchequer, c. 7. p. 168.

(*b*) 1 *Lord Raym.* 486.

they

they were in the absolute disposition of the crown (*a*); and whatever sums the necessities of the monarch required were raised by seizing their lands, though the lands of aliens

(*a*) Sciendum quod omnes Judæi ubicunque in regno sunt, sub tutela et defensione Regis ligea debent esse, nec quilibet eorum alicui diviti se potest subdere sine Regis licentia. Judæi enim et omnia sua Regis sunt. Quod si quispiam detinuerit eos, vel pecuniam eorum, perquirat Rex si vult tanquam suum proprium."—*Leges Edwardi*, c. 29. *Wilkins' Leges A. S. Selden Op.* v. ii. p. 1582. The authenticity of this law has been questioned by *Prynne*, Demurrer; and his doubts are supported by the author of the able and learned tract already cited, The question, &c.

In *Madox*'s account of the "Exchequer of the Jews," (History of the Exchequer, c. 7.) may be found some curious particulars of the Judaical revenue of the Norman kings, and the exactions practised on the Jews, for the benefit of the royal treasury. So entirely were the Jews the property of the monarch, that *Henry* the Third actually assigned and delivered to his brother, *Richard* Earl of *Cornwall*, all the Jews of *England*, as a security for the repayment of a debt—39 *Hen.* 3. Rex omnibus, &c. Noveritis nos mutuo accipisse a dilecto fratre et fideli nostro *R.* comiti *Cornubiæ*, quinque millia marcarum sterlingorum novorum et integrorum, ad quorum solutionem assignavimus et tradidimus ei omnes Judæos nostros *Angliæ*, &c. *Madox*, *Exchequer*, c. vii. p. 156. 1 *Rymer*, *Fœdera*, 315.

The parliamentary edition of *Rymer* contains a writ issued in the ensuing year, De scrutando arcas Judæorum pro *Ricardo* comite *Cornubiæ*, 1 *Rym.* 337. A writ of the 46th of *Henry* the Third bears the following title, De scrutando omnes arcas Judæorum, ac de capiendo omnia sua bona in manus regis per totum regnum. 1 *Rym.* 407.

The nature of the toleration extended to the Jewish worship appears in the following record of the 37th year of *Henry* the Third,—"Rex providit, quod universi Judæi in sinagogis suis celebrent submissa voce, secundum ritum eorum, ita quod Christiani

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aliens could not be seized without inquest of office found — *Molloy de Jure Maritimo*, l. viii. c. 6. In the reign of *Edward* the First, they quitted this country, whether in consequence of the Statute *de Judaismo* is uncertain (*a*), and returned not till the Commonwealth.

Christiani hoc non audiant." *Madox, Exchequer,* 169. 1 *Rym.* 293. But one of the most curious facts concerning their religious privileges, is the existence of a bishop or presbyter of the Jews who appears to have been, at some times, appointed by the crown, at others, elected by the Jews, subject to the royal approbation. The principal records on this matter may be found in 1 *Rym.* 95. 362. 591. *Madox, Exchequer, c.* 7. *p.* 177. *Tovey, Anglia Judaica,* 53. *et seq. Selden, Op.* iii. *p.* 1583, 1584.

(*a*) The statute *de Judaismo*, or, according to its original title, *de la Jeuerie,* Statutes of the Realm, i. 221. passed in the third year of *Edward* the First, *Prynne*, Demurrer. *Tovey*, 204. 232., concludes with a declaration, that the permission to the Jews, to take lands on lease, should not continue more than fifteen years from that time; and at the expiration of that period in the eighteenth year of *Edward* the First, the Jews of *England* were banished. The principal records connected with that event seem to have perished; but writs of safe conduct remain, issued in that year, entitled, Salvus conductus pro omnibus Judæis regnum exeuntibus Rege jubente; and reciting, cum certum terminum omnibus et singulis Judæis regni nostri præfixerimus idem regnum exeundi, &c. 1 *Rym.* 736. *Tovey*, 240. *et seq.* In page 244. of a copy of *Tovey's Anglia Judaica*, in the possession of the editor, is the following manuscript note: — "*Anno* 1306, 3 *Ed. Secundi*," (the date must be incorrect, *Edward* the Second having ascended the throne in 1307,) "circiter festum Sancti *Johannis Baptisti*, sex Judæi venerunt *Londoniæ*, eo quod voluerunt impetrari licentiam a Rege in *Anglia* commorandi; unus eorum fuit

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monwealth. (*a*) Throughout that long interval no Jew could be an object of this charity; nor can it be supposed that *Edward* the Sixth, a most religious monarch, designed to found an establishment for the support of infidels, by letters patent, in which he describes himself as Ecclesiæ Anglicanæ supremum caput. Christianity is a part of the law of *England* (*b*); to permit Jews to enjoy the benefit of the charity, would be indirectly to encourage a mode of faith, in support of which, according to the express decision of Lord *Hardwicke*, this Court will not interfere. (*c*) The letters patent specify as objects of the endowment, the instruction of youth in grammatica literatura et bonis moribus; and though in a knowledge of the learned languages Jews and Christians may agree, they differ widely in their interpretation of boni

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fuit Physicus. *Annales Civit. London. Bib. Cotton.* Otho. B. iii. The statute, 1 *Ed.* 3. st. 2. c. 3., Le roi veut, que les dettes des Jues soient perdonnez, Stat. of the Realm, i. 255., may probably be understood of the debts subsisting at the period of the banishment of the Jews, and which, on that event, became payable to the crown, *Ryley, Plac. Parl.* 129. 173., and seems not to authorize an inference of the residence of Jews in *England* when the statute was passed.

(*a*) During the protectorate, an address was presented on behalf of the Jews, soliciting the free exercise of their religion; a measure which *Prynne* opposed in his laborious tract: "A short Demurrer to the Jews' long discontinued barred Remitter into *England*." Of the proceedings on this application, an amusing account is collected by Dr. *Tovey*, who concludes that the Jews failed to obtain a legal establishment under *Cromwell*, and that their return occurred in the reign of *Charles* 2. *Anglia Judaica*, 259. *et seq.* an opinion supported by the author of The Question, &c. p. 36, 37. See also 1 *Haggard*'s Reports, App. nos. 1, 2.

(*b*) *Ante*, p. 490. n.

(*c*) *De Costa* v. *De Paz*, *ante*, p. 487. n.

mores;

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mores: the good morals contemplated by the founder were such as conform to Christian rules, and originate in Christian faith. There is no law tolerating an infidel religion, nor has any statute passed since the return of the Jews, and now in force (*a*), exempted them from the disabilities to which at the common law they are subject. In the debate on the bill introduced in a late reign, for the naturalization of the Jews (*b*), a question arose whether Jews born in *England* can hold real property as natural-born subjects? Mr. *Fazakerly* strongly maintained the negative (*c*); the opposite opinions of *Pigot* and others proceed on reasoning obviously inconclusive, that they know no statute depriving Jews of a right to hold; it was sufficient to know that there is no statute repealing the disqualifications of the common law. (*d*) So wide is the

(*a*) 1 *Ann*. st. 1. c. 30. 1 *Bl. Comm*. 449. 13 *Geo*. 2. c. 7. s. 3., and see 6 & 7 *W*. 3. c. 6. ap. *Gibson Cod*. 433. 10 *Geo*. 1. c. 4. 26 *Geo*. 2. c. 33. s. 18. "The Plaintiff had leave given by the Court to alter the venue from *London* to *Middlesex*, because all the sittings in *London* were on a *Saturday*, and his witness was a Jew, and would not appear that day." *Barker* v. *Warren*, 2 *Mod*. 270.

(*b*) 26 *Geo*. 2. c. 26. repealed by 27 *Geo*. 2. c. 1. An account of the debates on the latter bill may be found in Lord *Orford's* Memoires, i. 310. *et seq*.

(*c*) New Parliamentary History, xiv. 1406.

(*d*) Mr. *Webbe's* tract contains the concurrent opinions of Sir *Robt. Raymond*, Serjeant *Cheshyre*, Mr. *Pigot*, Serjeant *Whitaker*, Mr. *Kettleby*, Mr. *Lutwich*, Mr. *Reeve*, Mr. *Talbot*, and Sir *Clement Wearg*, that Jews, natives of *England*, have the same capacity of purchasing and holding lands as other subjects; a conclusion supported by *Webbe*, with much learning and ingenuity.

Mich. 27 *Geo*. 2.

"A question having been started, on occasion of the late act of parliament concerning the naturalization of the Jews, which act was repealed this session, whether Jews

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the distinction between Jews and other natives of *England*, that, on the trial of a Jew, the jury is chosen *de medietate*, half Christians and half Jews. (*a*)

It is in evidence that no Jew has ever been a *trustee* of this charity; the first statute, 4 *George* 3., required as a qualification in the trustees, that those who were not members of the corporation should be churchwardens; a provision which necessarily excluded Jews, whose exclusion from corporations was, as appears in

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Jews are entitled to purchase and hold lands in *England*, Lord *Temple*, after the repeal of the act, moved in the House of Lords, that some method might be taken to ascertain this question; and that for this purpose the judges might be desired to attend and give their opinions upon it; which was opposed, and the motion rejected, for many reasons, but particularly because the judges are not obliged to give their opinions to the house upon such extra-judicial questions, where no bill is depending; and the Duke of *Argyle* mentioned a case in Queen *Anne*'s time, where such a question being put to the judges, Lord Chief Justice *Holt*, in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such questions, and his objections were allowed by the house." Mr. *Coxe*'s MSS. E. E.

(*a*) The authorities for this practice refer to times before the banishment of the Jews, 1 *Rym.* 151. *Dyer*, 144. a. n. *Madox*, *Exchequer*, c. 7. p. 166. *et seq.* *Selden de Synedriis Vet. Hebr.*, *Op.* v. i. p. 1469. *Id.* "Of the Jews sometime living in *England*." *Op.* v. iii. p. 1460. *Barrington on the Statutes*, 225. Concerning the judges appointed to "exercise jurisdiction in the affairs of the *Judaism*," see *Madox*, *Exchequer*, c. 7. p. 159. *et seq.* 4 *Inst.* 254. *Tovey*, *Anglia Judaica*, p. 43. *et seq.* *Selden*, *Op.* v. iii. p. 1459 — 1462.; and for the assembly called the jewish parliament, *Prynne*, *Demurrer*, part 2. p. 28. *et seq.* *Tovey*, *Anglia Judaica*, p. 110. *et seq.*

 Blackstone,

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Blackstone (a), one of the objects of the corporation act, 13 *Car.* 2. st. 2. c. 1. The requisites of seisin of a freehold estate, and notice in the parish church, obviously refer to Christians. In the *objects* of the charity, the requisition of the Christian and surname of the candidates; of attendance at public worship on *Sunday*; of certificates of good conduct by the minister of the parish; and the provision for an exhibition to scholars going to the university, are all inapplicable to Jews. A Jew could not perform the duties of an apprentice to a Christian, the days appointed for work and rest being different in the two religions. The care of the monument and statue of Sir *W. Harper*, is inconsistent with the Jewish faith. The schoolmaster must be in orders: would it be reasonable to require a clergyman to superintend the education of persons in a faith opposite to Christianity? The general expression, good morals, is defined by the subsequent regulation, directing removal for non-attendance at church, as a species of misbehaviour. Could the master honestly release from the obligation of morning and evening prayers, a large proportion of the scholars; and if Jews are admissible, a majority might be Jews.

Sir *Samuel Romilly* in reply.

The result of the inquiries suggested by the Court is, that persons professing the Jewish religion have, in almost every mode, enjoyed the benefit of this institution; have been educated there, placed apprentices, and received the reward of good conduct; and that which the counsel on the other side suppose impossible has happened; a clergyman of the church of *England* has certified the moral merit of a Jew, thinking it prac-

(a) 4 *Bl. Comm.* 58.

ticable

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ticable for a man to be good without being a Christian. No Jew has held the office of trustee, because no Jew has resided in the town, who was not an object of the charity.

The manner in which this case has been argued, renders it of extreme importance; and if the doctrines advanced at the bar receive the sanction of the Court, this will be a new epoch in the jurisprudence of the country, so far as concerns religious opinions. The Solicitor-General supposes, that this Court will not give effect to a charity for the benefit of Jews. The decision of Lord *Hardwicke* in *De Costa* v. *De Paz* (*a*), proceeds expressly on the design of the institution in that case for the propagation of the Jewish religion. What would be the condition of Jews, if neither Jew nor Christian could establish a charity for their relief? It is sufficient that there is not even a *dictum* in support of that doctrine.

It has been said, that by the law of this country Jews are aliens, and disqualified to hold real property. Whatever might have been the opinion of Mr. *Fazakerly*, who was alone in it, on that point, the universal opinion at present is, that Jews born in this country are as much entitled to hold and enjoy lands, as other natives. (*b*) No one ever objected to a title because the estate had belonged to a Jew. It is matter of fact that no such notion is entertained by the present Chief Justice of the King's Bench, who purchased from a Jew the house in which he now resides. On any other supposition, the statute 13 *Geo.* 2. c. 7., which expressly enacts that Jews residing seven years in a *British* colony, and

(*a*) *Ante*, p. 487. (*b*) *Vide ante*, p. 508. n. (*d*.)

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taking the oaths prescribed, shall be deemed natural-born subjects, would be nugatory.

It is painful to comment on the doctrine cited from Lord *Coke's* report of *Calvin's* case; a doctrine disgraceful to the memory of a great man, whose latter years redeemed in some measure his failings as an officer of the crown. That passage has never been cited without reprobation. In *The East India Company* v. *Sandys*, Sir *George Treby* condemned it in the strongest terms. "I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical. It is akin to *dominium fundatur in gratia*." (*a*)

It is corrected by Sir *Edward Littleton* as a known error; and in *Omichund* v. *Barker* (*b*), Chief Justice *Willes* rejected it with indignation. "This notion, though advanced by so great a man, is, I think, contrary not only to the Scripture, but to common sense and common humanity; and I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation

(*a*) 10 *Howell's* State Trials, 392. *Vide ante*, p. 502. n.

(*b*) "Turks and Infidels are not *perpetui inimici*, nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice *Brooke*(1); for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons. Per *Littleton*, (afterwards Lord Keeper to King *Charles* I.) in his reading on the 27 *E*. 3. 17. MS." 1 *Salk*. 46. 1 *Atk*. 21. *Willes*, 538.

(1) *Ante*, p.

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reaps such great benefits. We ought to be thankful to Providence for giving us the light of Christianity, which he has denied to such great numbers of his creatures of the same species as ourselves. We are commanded by our Saviour to good unto all men, and not only unto those who are of the household of faith. And St. *Peter* saith, Acts, x. 34, 35, that 'God is no respecter of persons, but in every nation he that feareth him and worketh righteousness, is accepted with him.' It is a little, mean, narrow notion to suppose that no one but a Christian can be an honest man. God has implanted by nature, on the minds of all men, true notions of virtue and vice, of justice and injustice, though heathens perhaps more frequently act contrary to those notions than Christians, because they have not such strong motives to enforce them. But (as St. *Peter* says) there are, in every nation, men that fear God and work righteousness; such men are certainly *fide digni*, and very proper to be admitted as witnesses. I will not repeat what was said by Sir *George Treby* in the case of monopolies in the State Trials, vol. vii. p. 502, of this notion of Lord *Coke's*, and which was cited by one of the counsel, but I think that it very well deserves every epithet that he has bestowed on it. I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For though it may be founded upon some general sayings in *Bracton*, *Fleta*, and *Britton*, and other old books, those I think of very little weight, and therefore shall not repeat them. First, because they are only general *dicta*; and in the next place, because these great authors lived in the very bigoted popish times, when we carried on very little trade except the trade of religion, and consequently our

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notions were very narrow, and such as I hope will never prevail again in this country." (*a*)

It is said that this institution was founded by *Edward* the Sixth; and that establishing a charity for relief of the calamities incident to human nature, he, as a religious man, intended to confine it to persons of his particular persuasion. *Edward* the Sixth was the founder also of *St. Thomas's Hospital*: is it contended that a sick or wounded Jew is not admissible into that establishment? The argument that no person can be an object of the charity, who was not, or might not have been, in the contemplation of *Edward* the Sixth, would exclude the members of all subsequent sects. If no Jews are eligible because no Jews were resident in *England* during his reign, on what principle can Quakers be received? The statutes of *Elizabeth* were passed during the exile of the Jews, and if this argument is valid, no Jew can have the benefit of the poor laws. Jews, however, though, to their credit, they commonly maintain their own poor,

(*a*) *Willes*, 542. In *Campbell* v. *Hall*, Mr. *Hargrave* having cited the distinction mentioned by Lord *Coke* in *Calvin*'s case, between "countries vested in the king by conquest, and countries coming to him by descent," added, "in reporting this doctrine, Lord *Coke* mixes with it another distinction between infidel and Christian countries, which is now justly exploded." Upon which Lord *Mansfield* interposed, "do not quote the distinction for the honour of Lord *Coke*." 20 *Howell State Trials*, 294. His Lordship's judgment in that case, contains the following passage: "Laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim are incontrovertible; and the absurd exception as to pagans, in *Calvin*'s case, shows the universality of the maxim. The exception could not exist before the Christian æra, and in all probability rose from the mad enthusiasm of the crusades." *Id.* 323.

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are compelled to contribute to the poor's rate, and must either serve the offices of churchwarden and overseer, or fine for not serving.

If Lord *Coke*'s doctrine is pursued, we must proceed to some of our early writers, who declare that the marriage of a Christian with a Jewess, is a capital offence punishable by a cruel death. (*a*) On the same authority, no Jew can have the benefit of clergy. "It hath been said, that Jews and other infidels, and heretics, were not capable of the benefit of clergy, till after the statute 5 *Anne*, c. 6. as being under a legal incapacity for orders. (*b*) But I much question whether this was ever ruled for law, since the introduction of the Jews into *England*, in the time of *Oliver Cromwell*. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen *Anne* having certainly made no alteration in this respect, it only dispensing with the necessity of reading in those persons, who, in case they could read, were, before the act, entitled to the benefit of clergy." (*c*) Such is the doctrine of *Blackstone*. On their re-admission to this country, after the virtual repeal of the flagrant act of injustice which had banished them, the Jews were restored to the privileges of other subjects, and became entitled to the benefit of all institutions not confined to members of the established church.

The duty of repairing a monument, is not inconsistent with the Jewish religion, which permits statues for

(*a*) 3 *Inst.* 89. Contrahentes cum Judæis vel Judæabus, in terra vivi confodiantur." *Fleta*, lib. i. c. 37. See *Barrington on the Statutes*, 222.

(*b*) 2 *Hal. P. C.* 373. 2 *Hawk. P. C.* 338. *Fost.* 306.

(*c*) 4 *Bl. Comm.* 371, 372.

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temporal purposes; the second commandment is as much adopted by Christians as by Jews. The argument that Jews cannot be trustees, because they cannot be members of a corporation, proves too much, and would require the exclusion of all dissenters.

The Lord Chancellor.

The prescribed form of oath supposes that a quaker may be a trustee.

Argument in reply resumed.

The framers of the Articles could scarcely have taken so much pains to omit the use of the term Church, in requiring attendance on public worship, except with the purpose of not excluding sectaries. The synagogue is open every day, and a Jew might attend worship there on *Sunday*. The phrase "Christian name," has been relied on. If Christian name means baptismal name, Anabaptists are excluded. No one who reads the regulation can fail to understand that the design was merely to designate the person with certainty, and that the Christian name is used only as a familiar description of the name which distinguishes the individual from all other members of his family. The comprehensive words "all children of inhabitants, and children of all persons," &c., afford a much stronger inference of the intention of the founder, that there should be no exclusion. The only description relative to admission into the alms-houses, is of persons advanced in life, and wanting aid.

The doctrine of the other side amounts to this, that Jews reside here only by sufferance, with all their landed property at the pleasure of the crown, excluded from the

the benefit of every charity, in the condition of persecuted aliens.

The LORD CHANCELLOR.

What interest in the question have the gentlemen of the synagogue, who join in the petition? Every person possessing the character of an inhabitant of *Bedford*, and describing himself as an object of the charity, is entitled to apply to the Court; but how can I hear persons representing the synagogue? How can I notice the body called the Jews' Synagogue?

Argument in reply resumed.

That objection, at the utmost, renders those persons superfluous, and the petition must be considered as that of the other petitioners; but as any one may be a relator in an information, so any one may be a petitioner under the new act. (*a*) The members of the synagogue appear in their individual character, and the words, "elders of the synagogue," are merely descriptive.

The LORD CHANCELLOR.

Under which act is the petition presented?

Sir *Samuel Romilly*.

Under both acts.

The LORD CHANCELLOR.

I doubt whether the petition can be received, either under the particular act, or under the general act.

(*a*) 52 *Geo.* 3. c. 101.

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The LORD CHANCELLOR.

I am perfectly satisfied that Jew boys cannot be admitted into the school; whether the other provisions of the charity are applicable to Jews, is a question on which I have not quite formed an opinion.

The LORD CHANCELLOR.

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Persons presenting a petition under stat. 52 *Geo.* 3. c. 101. must have a direct interest in the charity.

There is a question in this case to which I must desire an answer, why the gentlemen of the synagogue are petitioners? Under Sir *Samuel Romilly*'s act (*a*), supposing this a petition which could be authorised by that act, (a point on which I shall hereafter remark,) no person can petition who has not a direct interest in the charity. The act, indeed, authorises "any two, or more persons," to present a petition; but I conceive, that those words must be understood to mean persons having an interest.

The LORD CHANCELLOR.

May 4.

One act giving final jurisdiction, and another act giving jurisdiction subject to appeal, the Court cannot proceed on both acts.

The petition proceeds on an allegation, that the petitioners are entitled to relief, either under the act relative to this particular charity, or under the general act, or under both those acts. The petitioners must elect on which act they will proceed; and for this reason: under the particular act the judgment of the Lord Chancellor is final; under Sir *Samuel Romilly*'s act it is subject to appeal; the Court, therefore, cannot proceed on both

(*a*) 52 *Geo.* 3. c. 101.

acts;

acts; the judgment cannot be both final and not final. I cannot give judgment in two jurisdictions.

If the petitioners proceed under the *Bedford* charity act, their affidavits, which are unstamped, cannot be read; it is only under Sir *Samuel Romilly*'s act that they are authorised to read affidavits without a stamp. (*a*)

A third point is, what reason is there for permitting the elders of the Jewish synagogue in *London* to become petitioners?

Another question also requires consideration, whether, regard being had to the nature of this case, which arises, not on misconduct, but on doubt of the construction of the articles, the Court possesses jurisdiction under the particular act, except on the petition of the trustees?

Mr. *Heald* in support of the petition.

Under the *Bedford* charity act, any person whatever, with the consent of His Majesty's Attorney General, may apply by petition. (*b*) Sir *Samuel Romilly*'s act is susceptible of a like construction. The words, "any persons," comprehend persons who may not have an interest. In the instance of charities for relief of the blind or the poor, it has been the practice to receive the petition of the minister of the parish; and on behalf of orphans seeking the benefit of a charity for fatherless children, the Attorney General may proceed without a relator.

The LORD CHANCELLOR.

The petition of the minister of the parish is received,

(*a*) 52 *Geo.* 3. c. 101. s. 3. (*b*) See the clause, *ante*, p. 477.

because

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The Attorney General may proceed without a relator.

because the poor may be burdensome to him; and there is no doubt that, though a relator is commonly required for the purpose of securing costs (*a*), the Attorney General may, if he pleases, proceed without a relator. The petitioners must make their choice between the acts; and if they proceed on the *Bedford* charity act, the office-copy of the affidavits must be stamped. When they have declared their election, I will decide the question as if the other act had not been mentioned.

Another matter may deserve consideration. I have not found any actual refusal to give the benefit of this charity to any individual except *Sheba Lyon*. I wish to know whether, supposing that any thing can be done on the petition of persons not trustees, I can give to the petitioners all that their petition seeks? It was argued, that persons of the Jewish persuasion are entitled to the benefit of all the distributions to be made of this charitable fund, or if not to all, at least to a part; and the petition prays that they may be declared entitled to all.

A doubt has also occurred to me, whether admissibility into the school is within my exclusive jurisdiction; whether it does not belong to the visitors, the warden, and fellows of *New College*? They have introduced a variety of regulations for the conduct of the boys' school, with which no Jew boy could comply. Without now giving final judgment, I have no doubt that a Jew boy cannot have the benefit of that school, because he cannot comply with those regulations.

May 8.

Mr. *Bell*, for the petitioners, declared their election to

(*a*) Some cases concerning relators are collected, *ante*, v. i. p. 305.

proceed

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proceed under the *Bedford* charity act, and suggested, that the petition should stand over, in order that the affidavits might be stamped.

Mr. *Shadwell* against the petition, proposed that the statement of the affidavits should be taken as true.

The LORD CHANCELLOR.

That cannot be done.

The question was argued on comprehensive principles, but is, in fact, no more than this, What is the meaning of these instruments? And I think that I need not much concern myself with general doctrines.

The affidavits on both sides were afterwards stamped.

The LORD CHANCELLOR.

May 11.

I have before me the petition of some residents of the town of *Bedford*, and also of persons not resident there; and without inquiring whether the last ought to have been joined, I will consider it only as the petition of the former. The petition claims relief under one or other of the acts of Parliament; but I now understand, that the petitioners rely on the *Bedford* charity act; not insisting on the other; and I am quite content to take it in that way, without giving them the trouble of amending the petition; it can easily be recorded, that the judgment of the Court proceeded on the *Bedford* act: but then arises a question, whether, on that act, the application is right in form? whether the best course of proceeding

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proceeding will not be, that a short petition should be presented by the trustees, stating, that doubts had arisen on the construction of the act in regard to Jews, and submitting to the Court what they take to be the true exposition, as far as those persons are concerned? On the letter stated in the petition, as on a great deal urged to me in argument, those liberal ideas about worshipping God in church, chapel, or synagogue, I purpose to make no observations; it is not necessary. The decision in *De Costa* v. *De Paz*, has established, that no one can found, by charitable donation, an institution for the purpose of teaching the Jewish religion; but it is quite a different question, whether property can be given to perform charitable acts to persons who happen to be Jews; and it appears to me, that the present is a mere question, whether these individuals are or not, within the four corners of this act of Parliament, objects of the charity thereby given? I have no concern with general principles; I am only to construe the act.

An institution for teaching the Jewish religion, is illegal; but whether property can be given to perform charitable acts to Jews, is a different question.

On behalf of any persons, objects of this charitable institution, the mode of proceeding, independent of the course provided by the act of Parliament, would be by information; if this is a case within the intent of the act of 52 *Geo.* 3. c. 101., the Court might proceed on a petition presented in the mode prescribed; if the present proceeding is to be considered as depending for validity on the jurisdiction given to the Court under the *Bedford* charity act, it then becomes necessary to inquire, in what cases, and by what form, this Court is to be applied to, recollecting the weight and effect of the proceeding, if correct? Whether the trustees were right or wrong in so doing, I mean to intimate no opinion; but for some years they admitted Jews and Jewesses to the benefit of the charity; they state, that they have since

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been advised, that they ought not to continue that practice; and a question which I should wish to suggest for their consideration is, whether they would proceed under a clause in the act, which authorises them to present a petition to the Chancellor; a proceeding which would render the order of the Court unquestionably valid. (*a*) Under that clause, when these doubts and difficulties arose, the trustees had it in their power to ask from the Court an exposition of the rules and orders, and the different passages in the schedule to the act, which would have served to them as a guide, with respect to those doubts. The letter written from the trustees to one of the elders of the synagogue, refers it to those who claim the benefit of the charity, to take such steps as they think proper, for asserting their rights. The question then arises, laying out of the case the 52 *Geo.* 3. c. 101., within which it would be extremely difficult for the petitioners to bring themselves, and if the application is not under the clause which I have just stated, whether the petitioners have any effectual mode of proceeding, except by information? The question would be, whether the next clause (*b*) was meant to apply to a case where there had not been misconduct or misdemeanor in the trustees, but where they acted erroneously, if you please, on doubts and difficulties which they felt with regard to the construction of the act of Parliament? The terms of that clause contemplate acts, not of the body of trustees, but of individuals being trustees; the language applies not to corporate bodies at all; I cannot examine them, and the usual process is not applicable.

The difficulty which I have on this is, whether, in an application of this sort, this clause authorises a proceeding of this summary nature against a corporate body,

(*a*) See the clause, *ante*, p. 499, 500. (*b*) *Ante*, p. 477.

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with respect to a matter which consists not in misconduct, or misdemeanour, or wilful misapplication; not in a case in which the Court can examine individual trustees, but in doubts and difficulties, with respect to which there is a provision in the former clause? I submit it, therefore, to the trustees, whether, in order to have this point settled, they would not better present a petition under that clause? The strong inclination of my opinion, on looking into the act of Parliament, is, that I have not jurisdiction in this case under the other clause.

Mr. *Bell.* — Even on an information, the question might arise, whether your Lordship would not quit the judicial character of Lord Chancellor, and pronounce an opinion in your visitatorial character of Lord Chancellor?

The Lord Chancellor.

Then the preliminary question would arise, whether I have a visitatorial character?

A petition was afterwards presented by the masters, governors, and trustees of the *Bedford* charity, praying a declaration whether the poor inhabitants of the town of *Bedford*, who were of the Jewish persuasion, were entitled, with Christians, to the benefit of the *Bedford* charity, for themselves or their children; or to what extent, and in what respects, if any, they or their children were entitled to the benefit of such charity.

The Lord Chancellor.

Aug. 23.

This case came originally before the Court, on a petition

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tition presented by certain persons resident in the town of *Bedford* and by certain other persons describing themselves as elders of synagogues in *London*; and it was insisted, that the petition might be sustained, either on the act called Sir *Samuel Romilly's* act, or on the act regulating the *Bedford* charity. There were difficulties in that way of considering the case. If the matter was contested, whether the corporation were trustees for Jews as well as Christians, great doubt arises whether the petition could be sustained under the first act; and, under the second, it was extremely doubtful whether the Chancellor had authority to proceed in this summary way by petition, in a case where the trustees were not accused of misconduct. It would be difficult to represent this as a case of misconduct, within that clause. Another difficulty, which I continue to think very considerable, is this: if Jews, inhabitants of *Bedford*, claiming to be objects of the charity, could, as inhabitants of *Bedford*, establish in themselves the character of *cestuis que trust* of this charitable fund, yet I cannot comprehend on what principle the petitioners, describing themselves as elders of the congregation of Dutch and German Jews, assembling at certain synagogues in *London*, have a right to present a petition. Those who are interested in the fund, provided Sir *Samuel Romilly's* act, or the *Bedford* charity act, apply to this case, namely, persons residing at *Bedford*, are entitled to the summary interference of the Court, but I know not on what ground these gentlemen residing in *London* can appear as petitioners. To receive their petition would be to give a sort of corporate character to individual petitioners, which this Court would not allow to be sustained. The *Bedford* charity act authorizes the Court, in the instance of misconduct of the trustees, to interfere on the petition of any person or persons; but I apprehend, that, in judicial construction, these expressions must be understood to mean, not persons having no in-

Persons presenting a petition under an act empowering "any person or persons whomsoever"

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to petition against trustees of a charity, must be interested in the fund.

terest, but persons who have an interest in the fund. If the petitioners resident in *Bedford* could have established their title as objects of the charity, still, as to the other petitioners, it would have been the duty of the Court to dismiss the petition as a matter of course. These difficulties, however, are removed by the petition which the trustees have preferred.

This charity had its foundation in letters patent of *Edward* the Sixth, who founded a grammar school at *Bedford* as in many other parts of the kingdom, and this is the foundation of a school, pro institutione et instructione puerorum et juvenum in grammaticâ literaturâ et bonis moribus. (*a*)

The Lord Chancellor having remarked that the phrase "boni mores" admitted various constructions in classical writers, and referred to the acts of 1764 and 1793, observed on the clauses authorising applications to the Court. Attending to the language of the enactments with respect to cases in which all the trustees ought to apply in a summary way, and of these enactments, on the authority of which the former petition was presented, it appears to me that the letter was not designed to authorize a petition for the construction of provisions on which doubts arose. The former enactment being appropriated to that purpose, this clause authorizes the Attorney-General to interpose if a trustee misconducts himself, which he could hardly be said to do when he was *bonâ fide* construing the act. I also think that the words "any persons" must mean persons interested, and therefore that the elders of the *London* synagogues had no authority to petition.

(*a*) *Vide* the Letters patent, *ante*, p. 472. *et seq.*

His

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His Lordship having stated the provisions of the acts of parliament, and of the schedule, proceeded thus:

I have detailed both the acts and the provisions contained in the schedule, for the purpose of presenting to my own attention, at least, the clauses on which observation was made in the course of the argument. It appears that until about thirty years ago, for reasons stated in that affidavit, there never was any distribution of these funds to the children of Jews, nor any application by Jews on behalf of their children; that within the last thirty years, some parts of the profits of these estates have been applied in favour of some children of the few Jews residing in the town; but, that on the application of the petitioner, *Isaac Lyon Goldsmith*, the trustees declared that they did not think themselves authorized to make application of the funds among the children of Jews.

Many arguments were addressed from the bar on the practice and principle of toleration. I apprehend that the present question is perfectly simple in its nature, and neither more nor less than this, whether the letters patent of *Edward* the 6th, and these acts of parliament, have or not comprehended within the true construction of their provisions persons of the Jewish persuasion? Whatever my sentiments may be of the opinions expressed in some clauses of the letter written on that occasion, I apprehend that it is the duty of every judge presiding in an *English* Court of Justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue, to recollect that Christianity is part of the law of *England* (*a*); that in giving construction to the charter and

Christianity is part of the law of *England*.

(*a*) *Vide ante*, p. 490. n.

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the acts of parliament, he is not to proceed on that principle farther than just construction requires; but to the extent of just construction of that charter and those acts, he is not at liberty to forget that Christianity is the law of the land.

With respect to usage, as far as usage is to be looked to for an exposition of the charter, it may be convenient first to consider it with reference to the question whether Jew boys can be admitted to the school, and next to the admission of Jewish maidens. I am not sure that the first question does not belong to the visitors (*a*); but I have no difficulty in giving my opinion on it.

A grammar school is a school for instruction in the learned languages.

An observation not without weight is, that this school was founded as a grammar school, by *Edward* the 6th, who founded many throughout the kingdom, and the words grammar school have generally been construed to mean a school for instruction in the learned languages (*b*); but I believe that it has been the practice from the beginning, and I hope that it still continues, and will long continue, that in these schools great care is taken to educate youth in the doctrines of Christianity; to teach them their duty to God and their neighbour, in the terms in which those duties are taught in the Catechism; and I remember the time when boys so educated were attended to church every *Sunday* by their master; thereby giving to them the opportunity of

(*a*) Lord *Hardwicke* declined to interfere in regulating the school of this charity, but controuled the application of the revenue. *Attorney-General* v. *Corporation of Bedford*, 2 *Ves.* 505. See the cases collected in *The Attorney-General* v. *Dixie*, 13 *Ves.* 519. *Ex parte Berkhampstead Free School*, 2 *Ves.* & *Bea.* 134.

(*b*) The *Attorney-General* v. *Whitely*, 11 *Ves.* 241. The *Attorney-General* v *Hartley*, 2 *Jac.* & *Walk.* 353.

learning

learning the principles of that establishment which the law certainly favors.

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The result of the affidavits is, that it does not appear that any Jew ever partook the benefits of the charity, till within the last thirty years; that a Jew has voted in the choice of trustees, being canvassed for his vote by one of the aldermen of *Bedford*, and that two or three Jewish children have been admitted into this school, (in what manner conducted will be seen presently,) that they have not received the benefit of other parts of the charity, the affidavits accounting for that, because from their circumstances of age or otherwise, they were not in a situation to solicit charitable assistance, or to be appointed trustees. Here are the regulations of the school approved by the warden and fellows of New College; and I can find nothing to raise an argument, that would authorize me to say, that they have not authority to make regulations for the conduct of the school. Even though the charter and the acts had not excluded Jews, the charter and the acts giving to the warden and fellows the power of making regulations, if these regulations, in a Christian country, operate to exclude Jew boys, it will remain to be considered, whether that is not a due exercise of visitatorial authority, and such as must be submitted to?

There is another way of considering it; Whether the visitors have not, in excluding Jews, rightly construed the charter and the acts? I have no doubt that *Edward* the 6th had not any intention for the education of Jews. Whatever may be our sentiments, it does not appear to me that they were within the scope of the charter, nor do I think that they are within the scope of the acts; the acts could not mean to comprehend persons who were not comprehended by the charter. How is

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it possible that the education of boys professing Christianity, and of boys professing Judaism, can proceed together? It is in evidence, that Jew boys were absent on Jewish holidays, and while the New Testament was read. They cannot comply with the regulations for education at this school, in what must, according to the construction of the charter, be held to be *boni mores*; the master always chooses the Latin and Greek books, and I know none of the grammar schools in which the New Testament is not taught, either in Latin or in Greek. In prescribing the school hours, directions are given for the attendance of the boys, on every day in the week, except *Sunday*; it is impossible that Jew boys can give that attendance, consistently with the observance of Jewish holydays. Prayers are to be read every morning. What kind of prayers? They are prayers in a grammar school, where the master is a clergyman, and where the scholars are to have exhibitions to the universities, to which it is impossible that any Jew boy can be sent. It is not necessary to go through all these particulars, because it seems to me that Jews resident at *Bedford*, acting conscientiously, could not permit their sons to attend this school. I am therefore clearly of opinion, that there is no pretence to say that they are entitled to attend.

With respect to the other objects of the charity, the only question before me relates to Jewish maidens. First, can it be that at the time of the letters patent, Jew girls were within their scope and meaning? Next, if it is clear that boys must be educated in the principles of Christianity, is there any thing in the Charter to authorize me to say, that it being the intention to found an institution, a great object of which was, education of boys in the Christian religion, other objects of the charity were to be persons not professing Christianity?

Various

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Various articles interspersed, all tend to shew that the design of the charity was to benefit persons professing the Christian religion. I shall mention only one; that girls are required to send in their Christian names. It is said that Christian name means only first name, and that, on the other construction, an Anabaptist could not be admitted. Be it so, but I apprehend that Christian name means something which a Jew would say does not belong to him. I apprehend that Christian name does not necessarily mean baptismal name. Though Anabaptists do not baptize until later in life than other Christians, I think that the name which they give to their children is, in a sense, a Christian name. Another circumstance is, that the children are to attend public worship every *Sunday*. It is stated, and I doubt not truly, that Jewish children do attend worship every *Sunday*; but can any one contend that the words of the letters patent, attending worship every *Sunday*, mean more than attending on a day on which, under the Christian religion, attendance at worship is more imperative than on any other day?

Mr. *Heald*. Another question relates to apprentice fees.

The LORD CHANCELLOR.

I think that the same thing.

The petition of the trustees having been presented to me since the argument, I mean to declare my opinion that Jews are not objects of the charity, but having heard no argument on this petition, I intend not to direct the order to be drawn up, without giving an opportunity of re-arguing the case, if the parties desire it.

 Mr. *Heald*

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Mr. *Heald* applied for the costs of the proceeding, as settling an important question.

The LORD CHANCELLOR.

Costs of proceedings in summary jurisdiction.

I doubt whether I have power to give costs. The trustees will take their costs under the act, without my order. On the first petition I could have made no order. I do not apprehend that in this summary jurisdiction I can give costs, unless the act of parliament authorizes me; in a cause I have power to give them, but not on proceedings in this summary jurisdiction. (*a*)

"His Lordship doth declare that the poor inhabitants of the town of *Bedford* who are of the Jewish persuasion are not entitled to any benefit of the *Bedford* charity in the said petition mentioned, for themselves or their children." *Reg. Lib.* A. 1818. fol, 2081—2083.

(*a*) The following account of a decision connected with the doctrine discussed in the preceding case, is extracted from a MS. in the possession of the Editor, and agrees nearly *verbatim* with a note among Lord *Colchester*'s MSS. A very imperfect report of the proceedings occurs in 2 *Atk.* 14. under the title of *Mellish* v. *Da Costa.*

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In *Chancery*, 17*th March*, 1737.

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V., the daughter and widow of a Jew, having agreed with her father, that he should have the care of the persons and estates of her two infant children, and in the event of their death during minority, should receive a moiety of their property, and having abjured Judaism and married a Christian, on the petition of the children the Court ordered that they should be delivered to their mother, guardianship not being assignable, and the agreement not purporting to be an assignment, and the right of the mother to be guardian continuing notwithstanding her second marriage.

The Defendant, Mrs. *Mellish*, was the daughter of Mr. *Da Costa* a Jew, and having married Mr. *Villareal* a Jew, had by him two children, one of whom is near nine years old, and the other about eight, and *Villareal* dying, a bill was brought in this Court touching the children's estate, &c. a decree thereon, and the fortune of the two children appeared to be 27,000*l.* each. Afterwards a treaty of marriage was had between the mother and one Mr. *Mendez*, and thereupon *Da Costa* her father prevailed on his daughter to assign over the guardianship of the two children to him, and to agree that if the two children died during their minority, he should have a moiety of their fortunes. The treaty of marriage afterwards breaking off, she married Mr. *Mellish* without her father's consent, and became a Christian, and Mr. *Da Costa* having possession of the two children, refused the mother to visit them, without a French woman being with them, &c. Thereupon Mr. *Mellish* and wife preferred this petition to be restored to the guardianship, or that she might have liberty to see the children without interruption alone, and the children liberty to visit her. Another petition was presented on behalf of the two children, praying that the Court would give proper directions for their education, &c.

Mr. *Browne* for Mr. *Mellish et ux.* This assigning the guardianship, is void by the mother, it being a personal right without any interest, but for the good and benefit of the infants, &c. and as it cannot be transferred, so neither can it be renounced. *Vaugh.* 177. *Bedell* v. *Constable.*

Mr. *Thomas Clarke* for the two children. They have a right to the mother's care, unless she be disabled or disqualified, which is not in this case, unless by the deed, by which it is pretended the mother has assigned her right of guardianship; and as to the deed itself, as it is of such a nature as the Court would

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would not carry into execution, so by the same reason the Court will not suffer it to be made use of in bar. *Plowd.* 294. *Osborn* v. *Carden*. *Barret* v. Lady *Penham*, guardianship not assignable, v. *Ca. in Dom. Proc.* 1724.(*a*) As to what may concern the religion of the infants, though that should be the choice of every person, yet as here they cannot choose, and as the method of education will naturally affect religious principles, therefore care should be taken of such education; but considering the temporal advantages only of the children, the education in Judaism will affect their fortunes, and the consequence of the children continuing with the grandfather, being educating them in a different religion from the parent, so that will lay a foundation for that difference in a family, which is too common upon account of their difference in religious principles, and especially in Jewish families; as appears by the provision made by the legislature for allowance by Jewish parents to convert *Christian* children; *Stat.* 1 *Ann.* c. 30.

Mrs. *Mellish* by affidavit, said she was baptized 28th of *March* 1735, and that her father Mr. *Da Costa* was a Jew.

Mr. *Talbot* for the children. *Vaughan*, 181. The one child here is a daughter, and the other a son. The daughter, as a Jewess, may be married improvidently, the son will be under incapacities, by our law as a Jew, can enjoy no offices, &c.

Mr. *Attorney General*, for Mr. *Da Costa*. Mr. *Villareal*, the former husband, died in 1730. Mr. *Da Costa* has had the care of the children under the Deed of Agreement in 1734, without any complaint by the children or the mother, till this petition. Agrees a guardianship cannot be assigned in law; but it does not follow but that the plaintiff, having such right, may agree that another proper person should exercise that authority. Debts are not assignable at law otherwise in this Court, and this petition is to set aside her own agreement. This Court is not bound to interpose in such cases. Case of Mr. *Hopkins* (*b*), having given to two of the daughters of Mr. *Jepp* about 10,000*l.*

(*a*) *Reynolds* v. *Lady Teynham*, 9 *Mod.* 40. *Lady Teynham* v. *Dacre Barret Lennard*, 4 *Bro. P. C.* 302.

(*b*) *Ex parte Hopkins*, 3 *P. W.* 151.

a piece,

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a piece, and the executor having the custody of the two children; the father petitioned to have the children educated, &c., but the Lord Chancellor *King* dismissed the petition, and said if the father could recover the possession of the children at law he might. The objection to the father was his being a farmer in the country, improper, &c. As to the children's petition, it is said they are not bound by the mother's agreement: and that no objection lies against her; but here by her second marriage she is not *sui juris*, and the children will come under the power of the father in law. The next objection is that the mother is now a Christian; this is a popular argument, but we are not to be wiser than the law; and it was thought one of the hardest parts of the persecuting of Protestants abroad, the taking away the children, and putting them under a different education; and if the Court should interpose in such cases, is afraid no children would be suffered to be educated otherwise than according to the legal establishment. The foundation of the statute 1 *Ann.* was, that children should be left free without force in their choice of religion. The Statute 12 *Car.* 2. c. 24. s. 8, 9., which gives power to the father to devise the guardianship of a child, takes no notice of the mother.

The deed and agreement between Mr. *Da Costa* and his daughter Mrs. *Mellish* read, dated 3d of *May* 1734. She agreed that if her two infant children should die infants intestate, he should be entitled to an equal mojety with her, and that she and all persons who should be entitled to the guardianship of the two children, should permit *Da Costa* to have the care of their persons and estates. On the back of the deed is an indorsement, dated *March* 1735, by Mr. *Mellish* and Mrs. *Villareal* (then his wife), whereby they confirmed and ratified the deed. A deed-poll signed by Mr. *Da Costa* whereby he agrees to permit Mrs. *Mellish* to visit the children at his house. Affidavit of Mr. *Da Costa* of the occasion of making the deed, on treaty of the daughter's marriage with Mr. *Mendez*, and her free act, and never refused her to visit the children; also affidavit of Mr. *Da Costa*'s care of the children.

Mr. *Fazakerly* and Mr. *Murray* on the same side. The guardianship of the mother is little regarded by the common or statute law of this

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this kingdom; and wisely so; because the mother by second marriage puts herself under the power of another; and her affection often alienated from the children of the first husband, to those of the second. Instances in the guardianship in socage, customs of *London*, &c. Case of Lord *Mansell*, who being about 14, would have chosen his mother (who was then married to a second husband) to be his guardian; but Lord *Talbot* refused it, but upon other persons of honour being joined with the mother's husband. Though a guardianship cannot be assigned, yet it may be renounced; and in case of an action at law by the mother here, the deed would bar. This is not such a case as the court should interpose any extraordinary power; and the giving the guardianship here to the mother, would in truth be giving it to the father-in-law; because she is in *potestate viri*. This is a general question, whether this Court will interpose to give a guardian to children upon account of religion? The children here as much (*a*) as they can be, considering their tender years. The father here might have devised the guardianship, upon the statute 12 *Car.* 2., though Roman Catholics are excepted, for political reasons. The true point is, whether this Court will change the education of the children, on this case, so as to change their religion?

The Lord Chancellor.

It is with reluctance he is obliged to determine questions of this sort, in family disputes, and more disagreeable where they relate to religious matters; but when it becomes necessary he must do it. Here are two petitions, first by the mother, second by the children. As to the mother's, her claim must be considered first. Her claim, as before the deed of 1734, is clear, and a right in her. It has been truly said that the right of guardianship of the mother differs from that of the father; she cannot devise, as the father may by the statute of *Car.* 2. (*b*) The mother's right abstracted from socage, (which is not here the case, there being no lands,) arises from nature. She has a right to the custody of the persons, and care of the education; and this in all countries where

A mother cannot appoint a testamentary guardian.

Right of the mother as guardian by nature.

(*a*) A blank occurs here in the original MS.

(*b*) *Bedell* v. *Constable*, *Vaugh.* 177. *Ex parte Edwards*, 3 *Atk.* 519.

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where the laws do not break in. The grandfather has no right to interpose, otherwise than as the mother being his daughter, owed a duty to him. It must be admitted likewise, that the mother had no right to assign the guardianship; no guardianship assignable except in chivalry. Lord *Vaughan* in *Bedell* v. *Constable*, calls it a private office of personal trust. (*a*)

Guardianship not assignable.

Next, how it stands under the deed of *May* 1734. It must be agreed that that does not transfer the guardianship. As to the difference that though things may not be assignable at law, yet they may in equity, that is, where they consist in interest; and therefore guardianship is no more assignable in equity than at law; and the deed here does not use words of assigning, but is an agreement that the grandfather should have the actual care and education, and that she would not interpose. It is therefore clear that Mr. *Da Costa* has gained no right to the guardianship under this deed, but to clear the mother, &c. It seems a little strange to come into a court of equity to pray contrary to the agreements of the party; and much less can the court set aside the agreement in this summary way. No imputation on the behaviour of Mr. *Da Costa*, and therefore no ground to relieve Mrs. *Mellish* on her petition, and her petition therefore dismissed; but as to the petition of the infants another consideration. Objection to this that it comes from the mother; but though it may be so, yet as this comes before the court in a case where the court has given directions touching the estate of the infants, the court ought to interpose, from whatever hands it comes, though from a mere stranger; and so it was done in the case of Lord *Dudley* to controvert the accounts of the receiver.

Here are two questions; first, whether in the power of the court to give any directions to deliver them to the mother? Whether proper? As to the first, the *power*, has no doubt of it, though no cause depending, as was Mr. *Barrett* and Lady *Teynham*'s case. (*b*) As to the

Orders relative to the guardianship of infants without a cause depending.

(*a*) *Vaugh.* 177. *Eyre* v. *Countess of Shaftesbury*, 2 *P. W.* 121. *Earl of Shaftesbury* v. *Shaftesbury*, *Gilb. Rep. in Eq.* 172.

(*b*) *Reynolds* v. *Lady Teynham*, 9 *Mod.* 40. *Lady Teynham* v. *Dacre Barrett Lennard*, 4 *Bro. P. C.* 302. See *ex parte Salter*, 2 *Dick.* 769. 3 *Bro.*

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Right of guardianship not decided on *habeas corpus.*

the interposition of courts of law on *Habeas Corpus*, the courts of law have nothing to do about the right of guardianship, but as to the liberty of the party only(*a*); and there are proper writs, as ravishment of ward, &c. and *Habeas Corpus* is only for the court to take care that the party be not confined contrary to law.

Secondly, as to the discretion of the court; and holds that he is bound to interpose. Has declared that the deed passes no right, but that it still remained in the mother; and whatever the mother has done, if she neglects, the children may complain, or any one for them. Much has been said on the point of religion; holds the true state of the question to be, whether this court shall not take the infants out of the hands of a person who has no right of guardianship, and put them into the hands of the person who has the right, and is of the religion of this country? Do not by any means intend, but declare the contrary, to take the children of Jews from their parents, any farther than as required by the act of parliament. (*b*)

The Court of Chancery will not interfere with the education of the children of Jews, farther than is required by statute.

It has been said, that the father of the children was a Jew. I see nothing to prevent the father from devising; but the father being dead, and not having disposed of the guardianship, the father's right devolves to the mother, and she is here of the religion of the country, and there-

A Jew may devise the guardianship of his children under statute 12 *Car.* 2. c. 24.

3 *Bro. C. C.* 500., where some earlier authorities are collected. *Spencer* v. *Earl of Chesterfield*, *Amb.* 146. *Ex parte The Earl of Ilchester*, 7 *Ves.* 348. *Eyre* v. *The Countess of Shaftesbury*, 2 *P. W.* 102. *O'Keefe* v. *Casey*, 1 *Schoales & Lefr.* 106. *Ex parte Woolscombe*, 1 *Mad.* 213. *Ex parte Mayerscough*, 1 *Jac.* and *Walk.* 151. In *ex parte Hopkins*, 3 *P. W.* 151. Lord Chancellor *King* declined to order, on petition, the delivery of infants to their father.

(*a*) The decisions on this point seem not perfectly consistent. *Rex* v. *Johnson*, *Lord Raym.* 1334. 8 *Mod.* 214. 1 *Str.* 579. *Rex* v. *Smith. Ridgeway, Rep. Temp. Hardwicke*, 149. 2 *Str.* 982. 3 *P. W.* 155. n. *Rex* v. *Delaval*, 3 *Burr.* 1435. 1 *Bl.* 410. *Rex* v. *Hopkins*, 7 *East*, 579.

(*b*) On a bill by a testamentary guardian against a trustee, the answer of the Defendant, representing the Plaintiff as an unfit person to have the management of the minors, "being a man of small fortune and increasing family, and also a sectary," was declared scandalous and impertinent. *Corbet* v. *Tottenham*, 1 *Ball & Beatt.* 59.

fore

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In re Masters, &c. of the Bedford Charity.

Villareal v. *Mellish.*

fore no reason to take the right from her.

As to the statute 1 *Anne*, though the present case is not within the provisions of it, yet the reason weighs; for, if a Jew child become Christian, the act of parliament takes away the father's power, and as the children here are of such tender years that they cannot choose for themselves, should not the Court interpose to assist in restoring them to their rightful guardian?

No person has greater regard to conscience, but holds likewise that the Christian religion is part of the law of the land, and so held and declared by Lord Chief Justice *Hale*, in the case of the *King* v. *Taylor*, 1 *Vent.* 193. 3 *Keb.* 107.

Order the children to be delivered forthwith to the mother. (*a*)

(*a*) On the power of the mother as guardian of her infant children, notwithstanding a second marriage, see *Pottinger* v. *Wightman*, 3 *Mer.* 67.

THOMAS HAWKSHAW, - Plaintiff.

WILLIAM PARKINS and JOHN THOMPSON, Defendants.

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July, 21. 23. *Nov.* 12. 1819. *Feb.* 27.

Demurrer to a bill by a surety, stating, that two partners having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled. Whether a release so executed binds all the partners, *quære.*

A writ of injunction issued after execution is in the same form with the common writ before execution.

The Plaintiff, in equity, having been taken in execution, and discharged by a judge of the court of law, on payment into the hands of the Master of that court, of the amount of the sum indorsed on the writ, with sheriff's poundage; and the common injunction having afterwards been issued; on motion to dissolve the injunction, it was ordered, that the Plaintiff might apply to the court of law for payment to him and to the Defendants, of the sum paid into the hands of the Master, that sum, when received, to be paid into the bank to abide the event of the cause.

THE bill filed on the 10th of *June* 1818 stated, That one *Daniel Rencher*, late of *Bedford* Street, in the county of *Middlesex*, coal merchant, but now abroad,

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abroad, and out of the jurisdiction of the court, sometime in the year 1810 represented to the Plaintiff that he had considerable dealings with the Defendants, who carried on trade as coal merchants at the *Adelphi*; and that he could obtain a considerable enlargement of his credit with the Defendants, if he could procure some respectable person to join him in a security to them by way of bond, and he requested Plaintiff to join him, upon an assurance that no risk was likely to be incurred in so doing, as the credit allowed by the Defendants to *Rencher* was small, and the settlements frequent; that the Plaintiff, influenced by such representations and assurance, and being willing to accommodate *Rencher*, consented to join in such security, and for that purpose executed with *Rencher* a joint and several bond to the Defendants, dated the 1st of *May* 1810, in the sum of 500*l.* conditioned to be void on payment by the Plaintiff and *Rencher* or either of them of the sum of 250*l.*, or any less sum that should or might thereafter become due from time to time for coal delivered to *Rencher* by the Defendants; that some time in 1816 *Rencher* having become embarrassed in his circumstances, entered into a composition with the Defendants and his other creditors, whereby they agreed to accept an assignment of his property, and in consideration thereof to execute a release of their several demands; that on the 27th of *August* 1816 an indenture of that date was executed by *Rencher* of the first part, *C. G.* a creditor of *Rencher* of the second part, and the Defendants, and *W. M.*, and *M.* his son and copartner, being *bonâ fide* creditors of *Rencher*, of the third part, whereby after reciting that *Rencher* stood indebted to the parties of the second and third part in the several sums of money set opposite to their respective names, and was unable, by reason of certain losses, to pay the whole of their respective demands, but in order to render to them the utmost

utmost satisfaction in his power, had proposed to convey all his estate and effects to *C. G.* in trust for himself and the rest of the creditors of *Rencher*, rateably and in proportion to the amount of their several debts, to which the parties of the third part had consented and agreed, and had chosen and appointed *C. G.* to be a trustee accordingly, it was among other things witnessed, that the creditors, parties of the second and third parts, severally and respectively, and for their several and respective executors, &c. accepted the said assigned premises, estate, and effects in full payment and satisfaction of their respective debts, and released *Rencher* from the said several debts, and from all actions, suits, &c. for or by reason of the debts so due to them, or of any other matter whatever, antecedent to the day of the date of the indenture.

The bill further stated, that the indenture was executed by the Defendant *Thompson* on behalf of himself and his copartner *Parkins*, but *Parkins* did not, save as aforesaid, execute the same, and the deed was not therefore binding upon him or the firm as a release at common law; but submitted that it was a sufficient discharge in equity of any claim or demand which the Defendant might have had by reason of the bond against the plaintiff as surety, and that the bond ought to be delivered up to the Plaintiff to be cancelled. It was also stated that the Defendant had commenced proceedings at law against the Plaintiff on the bond, and had caused him to be arrested and held to special bail for the sum of 250*l*. The bill, charging that the indenture was executed by *Thompson* on behalf of himself and his copartner, and that though the Plaintiff could not take advantage of the indenture by way of plea in bar to the action at law, yet that the same ought to be considered in equity as a good discharge of Plaintiff's liability on the

 bond,

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HAWKSHAW v. PARKINS.

bond, inasmuch as the principal was thereby released, and the Plaintiff only a surety therein, prayed that the Defendants might be restrained by injunction from proceeding at law against the Plaintiff in respect of the matters aforesaid, or upon the bond, and that the bond might be delivered up to the plaintiff to be cancelled.

The Defendants filed a general demurrer.

Mr. *Wetherel* for the bill.

The release being executed by *Thompson* only, is not at law binding on *Parkins*. A partner cannot bind his copartner by deed, unless expressly authorised by the articles of partnership. (*a*) In proceedings under the bankrupt laws indeed, one partner is permitted to act for all (*b*); but those exceptions have never been considered as impeaching the general rule. At law, therefore, the Plaintiff has no defence; but in equity a partner having accepted a composition from the principal, has discharged the surety (*c*); and the release, though it cannot be pleaded at law, is an effectual discharge of the surety in equity. It is clear that a release to one co-obligor, is, in equity, a release to both. *Bower* v. *Swadlin.* (*d*) At least one part of the relief prayed by the bill is equitable, namely, that the bond may be delivered up to be cancelled.

Mr. *Seton* in support of the demurrer.

A release to one of several co-obligors discharges the rest.

(*a*) *Harrison* v. *Jackson*, 7 *T. R.* 207. See *Ball* v. *Dunsterville*, 4 *T. R.* 313.

(*b*) *Ex parte Hall*, 1 *Rose*, 2. *Ex parte Hodgkinson*, 19 *Ves.* 291.

(*c*) The cases on the discharge of the surety by transactions with the principal, are collected in *Mayhew* v. *Crickett*, *ante*, p. 185.

(*d*) 1 *Atk.* 294.

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rest. *Com. Dig. Pleader*, 2 W. 30., on the authority of a passage in 2 *Rolle*, 410. l. 47. (*a*) A release of partnership debts executed by one partner, concludes the firm. *Montague* on Partnership. (*b*) And a deed of composition of debts is an exception to the general rule that one partner cannot bind the rest by deed. "When a trader is unable to satisfy the demands of his creditors, to save the trouble and expense of a commission of bankruptcy, upon his giving up all his effects, they may agree to accept a certain proportion of the debts due to them, in satisfaction of the whole. This can only be done by deed, and there is generally introduced into it a clause of release. If copartners are creditors, and come in under the composition deed, it binds all if executed by one, and may be pleaded in bar of an action brought for the previous debt, either in conjunction with him who executed it, or by the others as surviving partners after his death." *Watson* on Partnership. (*c*) The plaintiff, therefore, on his own statement has a defence at law.

The LORD CHANCELLOR.

When a bond is prepared as the joint bond of two persons, though formerly if executed by one only, being intended to be executed by both, it was considered as the bond of neither, it has been lately and repeatedly held to be the bond of him who executed it. (*d*) The question then here would be, whether this release, if not valid

(*a*) Probably 2 *Ro. Abr.* 412. G. 4. 5., see *Co. Litt. Ed. Hargr.* 232. a. n. 1. *Dorchester* v. *Webb*, *W. Jones*, 345. *Cheetham*, v. *Ward*, 1 *Bos. & Pull.* 630., and the authorities cited in *Dean* v. *Newhall*, 8 *T. R.* 168.

(*b*) P. 21. citing the *dictum* in *Tooker's* case, 2 *Co.* 68., that in personal actions one joint-tenant may release all, and the argument of *Wood*, in *Swan* v. *Steele*, 7 *East*, 211.

(*c*) P. 225.

(*d*) *Elliot* v. *Davis*, 2 *Bos. & Pull.* 338.

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valid against both the partners, is valid against one? If so, the parties are right in coming into equity, because the release, though not good against both, changes the nature of the property.

In reply to a question by the Lord Chancellor, whether, if two partners have a demand against a principal and a surety by bond, and one, professing to act for the other as well as himself, signs, seals, and delivers a release, that release is at law valid against himself, if void against his partner? The Solicitor General, *amicus curiæ*, stated that he had never known the point occur in practice, but thought that the release might be pleaded; that a deed amounting to a mere acceptance of terms of composition, executed by one partner, is not binding on the rest, but that a release so executed binds all, the release of a joint-obligation by one, being at law an extinguishment of the debt.

The LORD CHANCELLOR.

When Courts of Law have held that a bond which was intended to be executed by two as a joint bond, being executed by one is valid as his bond, why is this release not valid? The bill prays an injunction against actions on the surety bond. In *Harrison* v. *Jackson*, the question depended in great measure on the nature of the deed. I take it that that was a deed by which one partner, signing, sealing, and delivering for himself and his partners, undertook to make a grant; the effect of such a deed is very different from the effect of a release.

It is common for suitors to apply here to be discharged from bills of exchange, from which they might be discharged at law, the original jurisdiction being here.

Very

Very many injunctions have been granted to restrain proceedings on bills of exchange, where time given would have afforded a good defence at law on the rule that sureties are discharged by time given to the principal. We had bills in this Court before that doctrine prevailed at law. The fact that that doctrine now constitutes a legal defence is no reason why the equitable jurisdiction of this Court should not be maintained.

The Lord Chancellor.

The case is no more than this. The Plaintiff's bill states, that he executed a bond in the penalty of 500*l.*, as surety for the payment of 250*l.*, the obligees being partners; that all the creditors of the principal, including the obligees in the bond, agreed to accept an assignment of his effects, and to give a release: that is the substantive charge in the bill. It then states, that the release was executed by the creditors, but that the mode of release by these two creditors, the obligees, was, that one only released, signing and sealing the deed for himself and his partner; it proceeds to allege, that the deed being executed by only one partner, the Plaintiff cannot defend himself at law, and prays that it may be declared a good discharge in equity against the surety. *July 23.*

The case was argued before me on the question, whether this was a valid legal release; but without adverting to that question, and supposing that it would not be valid at law, still the bill has charged, that the Defendants agreed to execute a release, and that an assignment was made in performance of that agreement; that will sustain the agreement in equity if not in a court of law. It was contended, that the Plaintiff could not support this

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Concurrent jurisdiction of courts of equity not excluded by the adoption of equitable principles by courts of law.

this bill if he had a legal defence. I cannot accede to that argument. It has always been held here, that time given to the principal releases the surety; the recent adoption of that doctrine, by courts of law, will not exclude the concurrent jurisdiction of this Court. Another circumstance is, that the bill prays relief which cannot be obtained at law, the delivery of the bond to be cancelled. I am therefore of opinion, that the demurrer must be overruled.

Demurrer overruled. Reg. Lib. A. 1817. fol. 1883.

On the 23d of *July*, the day on which the demurrer was overruled, the Plaintiff obtained from the Vice Chancellor an order for the common injunction till answer and further order, allowing the Defendants to call for a plea and proceed to trial thereon, and for want of a plea to enter up judgment, but staying execution; and an injunction was issued accordingly.

Nov. 12. On this day the Defendants moved, that the order of the Vice Chancellor might be discharged, and the injunction dissolved; or that, notwithstanding such order and injunction, the Defendants might be at liberty to make an application to the Court of King's Bench for payment to them of the money paid by the Plaintiff into the hands of the Master of that Court.

The affidavit of the Defendant's solicitor, in support of the motion, stated, that in the action commenced by the Defendants on the bond, a verdict for 250*l.* was found for them; and on the 20th of *June* 1818, the Plaintiff was taken in execution by the Sheriff of *Middlesex*, under a writ of *capias ad satisfaciendum*, for the sum of 325*l.* 10*s.*, being the amount of damages and costs

costs in the action; that on the 23d of *June*, on an application by the Plaintiff, Mr. Justice *Bailey* ordered the Plaintiff to be discharged out of the custody of the Sheriff, upon payment into the hands of the Master, of the amount of the sum indorsed on the writ, with the Sheriff's poundage, to remain in the hands of the Master until farther order; and that the Defendants have put in an answer, denying the whole equity of the Plaintiff's bill.

Mr. *Agar* for the motion.

The merits have been decided at law; if the release could have been pleaded in the action, this Court, which never relieves mispleading, will not restrain proceedings under the execution. The release, if void at law, cannot be good in equity. A common injunction, issued after execution executed against the person, is irregular.

Mr. *Blake* against the motion.

On the demurrer, the Court decided, that the Plaintiff might be entitled to equitable relief. The Court will not permit the Defendants to obtain the money, till the question of equity is determined. *Axe* v. *Clarke* (*a*), *Franklin* v. *Thomas*. (*b*) A motion to dissolve the common injunction *per saltum*, without the usual order *nisi*, is contrary to practice.

The LORD CHANCELLOR.

In what instances has the common injunction been granted, after the body has been taken in execution? Where the money has been levied, the writ is often issued, because the execution is not complete till the return:

(*a*) 2 *Dick.* 549. (*b*) 3 *Mer.* 225.

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turn; and many acts may be done between the levy and the return; but where the body has been taken, the execution is executed. Mr. Justice *Bailey* would not have discharged the Plaintiff out of custody, without payment of the money to the Defendants, unless he had observed some irregularity in the proceedings.

The LORD CHANCELLOR.

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There is no doubt that if execution has been executed before an injunction can be obtained, in a case in which the Court will interfere after execution executed, the Court must set the matter right; but cases in which it will so interfere, are special.

The old practice always was, by supplemental bill to make the sheriff a party, and order him to pay over the money. Lord *Thurlow* thought that if goods were in the hands of the sheriff, the order would authorize the sheriff to stay proceedings, but if he chose to pay over, he might. (*a*) The Court afterwards resolved, that if the money was paid over, it would compel a return. If the law is so with regard to goods, it is impossible to maintain that the party shall not have relief where the execution is against the body, because the sheriff cannot do with that as with goods.

In *Franklyn* v. *Thomas* (*b*), on the day on which the Plaintiff would have been entitled to an injunction, the Defendant demurred, and by that means prevented the issuing the writ. One of the great difficulties was on the form of the injunction; the common form allowing the

(*a*) *Axe* v. *Clarke*, 2 *Dick.* 549. 3 *Mer.* 234.

(*b*) 3 *Mer.* 225.

party

party to call for a plea, and proceed to trial, &c.; and I think that on inquiry we satisfied ourselves, that even in those special cases the common form is employed. The practice of applying that form itself, established that there must be some principle for the application. It would be an intolerable hardship, that when the body is taken, the party could not be discharged from execution; but if the Court delivers him, care must be taken to place him in such a situation that he shall not be at liberty to say, that he has satisfied the execution.

Where an injunction is issued after execution against the goods, the sheriff may proceed to sell, but the Court will, in special cases, stay the money in his hands.

I agree with Lord *Thurlow*, that, after the injunction, the sheriff might proceed to sell; but not if he meant to say that the Court would not stay the money in the hands of the sheriff: always considering these as special cases, and admitting that, in ordinary cases, the Court will not interfere.

Mr. *Agar* mentioned, that this subject had recently undergone discussion before the Court of Exchequer; and Mr. *Blake* added, that, in that instance, the bill was filed after execution against the person.

The LORD CHANCELLOR.

There is an important difference between a bill filed after execution, and a bill filed for the purpose of preventing execution.

The present is a very special case. Unless I misrecollect what passed on the former occasion, although the party is already in execution, yet, if the case is such that the Court would grant an injunction after execution, the form of the writ is the same as in the ordinary cases. (*a*)

(*a*) This position was confirmed on reference, by the registrar, Mr. *Croft*.

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In many cases the injunction is granted after execution executed, as on warrants of attorney. If the court of law has acted on what I may call its equity, that affords no reason why this Court should not entertain jurisdiction on a bill filed. It is quite a different question where judgment has been obtained after proceedings at law.

Whether a covenant not to sue one of several co-obligors is in equity a release of the rest, *quære?*

I apprehend that I shall feel no difficulty on the doctrine as between principal and surety. If I mistake not, there is, in the *Term Reports*, a decision, that a covenant not to sue one of several co-obligors is not, at law, a release of the co-obligors. (*a*) That may introduce a question whether such a covenant is not a release in equity.

"His Lordship doth order, that the Plaintiff be at liberty to make an application to the Court of King's Bench for payment to him and to the Defendants, of the money paid by the Plaintiff into the hands of the Master of the said Court of King's Bench, pursuant to the order of Mr. Justice *Bailey*, on the 23d day of *June* 1818; and it is ordered that they do pay the same when so received, to be verified by affidavit, into the bank, with the privity of the Accountant-General of this Court, on the credit of this cause, to abide the event of this cause; but this order is to be without prejudice to the right of any of the parties to such money, or any of the questions in this cause."

Reg. Lib. A. 1818 fol. 1281.

(*a*) *Dean* v. *Newhall*, 8 *T. R.* 168. *Hutton* v. *Eyre*, 6 *Taunt.* 289.

END OF THE THIRD PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

ROLLS.
1818.
June 2
July 23. 24.
1819.
March 18,
19. 24.

CAMPBELL *v.* MULLETT.

WILLIAMSON *v.* LONGMEAD.

Two American citizens residing at *Baltimore*, and a French subject residing at *St Domingo* being in partnership, and owners of certain ships captured by British cruizers, and the commissioners appointed under the 7th article of the Treaty of Commerce concluded in 1794, between this country and *America*, for awarding compensations to American subjects who had suffered losses by capture for which they could obtain no redress in the ordinary tribunals, having awarded in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy; the sums so awarded are not partnership property, and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans.

THE original bill filed on the 14th of *July* 1804, by *Archibald Campbell, David Williamson, James Dall, John Munnickhuyson*, and *Joseph Sterrett*, of *Baltimore*, in *North America*, and *John Heathcote* of *London*, Merchants, (the first five Plaintiffs being trustees of the estate and effects of *Stephen Zacharie*, of *Baltimore*, Merchant on his separate account, and as a partner of Messrs. *Coopman* and *Vochez*, lately trading in *Baltimore*, under the firm of *Zacharie, Coopman*, and Co.,) stated that in *November* 1794, a treaty of amity, commerce, and navigation, between his Majesty King *George*

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the Third, and the United States of *America*, was signed by certain Ministers Plenipotentiary, and in the course of the following year duly ratified by his Majesty and the then President of the United States; that by the 7th article of the treaty, after reciting that complaints having been made by divers merchants, and other citizens of the United States, that, during the course of the war, in which His Majesty was then engaged, they had sustained considerable losses and damages, by reason of irregular or illegal captures or condemnations of their vessels and other property, under colour of authority or commissions from His Majesty, and that from various circumstances adequate compensation for the losses and damages so sustained, could not then be obtained by the ordinary course of judicial proceedings, it was agreed, that in all such cases where adequate compensation could not, for whatever reason, be then actually obtained in the ordinary course of justice, full and complete compensation should be made by the *British* government to the claimants, and that for the purpose of ascertaining the amount of any such losses and damages, five commissioners should be appointed and authorized to meet and act, and that the award of the commissioners or any three of them should in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the claimants, and His Majesty undertook to cause the same to be paid to such claimants *in specie*, without any deduction, in such place, and at such time, as should be awarded by the commissioners; and that five persons were duly appointed and constituted to carry into effect the provisions of that article.

The bill proceeded to state, that *Stephen Zacharie*, *Francis Coopman*, and *John Vochez* (deceased) were, in the year 1793, and had been for some time previously merchants

merchants and co-partners at *Baltimore*, under the firm of *Zacharie*, *Coopman* and Co., and traded to the *West Indies* and *Europe*, *Zacharie* and *Vochez* residing at *Baltimore*, and *Coopman* residing at the island of *St. Domingo* in the *West Indies*; that some time in the year 1793, in consequence of the capture of many of their ships by *British* cruizers, and large debts due to them from the *French* government, *Zacharie*, *Coopman*, and *Vochez* became embarrassed, and at length stopped payment of their debts; that in *November* 1794, *Vochez* intending shortly afterwards to proceed on a voyage to *Europe*, it was agreed between him and his co-partners, that he should collect for his and their use, all the monies due or to become due to him and them as co-partners in *Europe*, and in pursuance of such agreement, *Zacharie*, *Coopman*, and *Vochez*, on the 24th day of *November* 1794, executed a power of attorney to *Vochez*, to recover and receive all sums of money, debts, &c. and demands whatsoever, due, payable and belonging to them or detained from them by any means, and perform all things for them as copartners, as he should from time to time find necessary and convenient; that in 1795 *Vochez* arrived in *England*, and commenced business on his own account in *London*, as agent for the *French* prisoners in this country, and continued to reside here until his death; that *Vochez*, on the 24th of *March* 1798, executed a power of attorney to *Thomas Mullett* and *Joseph Jeffries Evans*, whereby, on behalf of himself and his co-partners, and under and by virtue of the former power of attorney, he substituted in his place *Mullett* and *Evans*, for him and his co-partners; that *Mullett* and *Evans* in *April* 1798, on behalf of *Zacharie*, *Coopman*, and *Vochez*, as co-partners, and as their agents

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or attornies, and also on behalf of *Zacharie* on his own private account, and as his agent or attorney, presented several memorials to the commissioners appointed to carry into effect the provisions of the 7th article of the treaty, praying compensation and relief for the loss sustained by *Zacharie*, *Coopman* and *Vochez*, as co-partners, and also by *Zacharie* on his own private account, by reason of the capture and condemnation of their ships and the cargoes thereof, by the *British*; and on the 8th of *July* 1803, the commissioners by seven awards, adjudged and awarded that seven sums of money should be paid to *Mullett* and *Evans*, on behalf and for the sole use of *Zacharie* and *Vochez*, their executors, administrators, and assigns, for the losses, and expenses sustained by them, in consequence of the capture of seven ships named; and the commissioners also, by another award of the same date, adjudged and awarded, that the sum of 1496*l.* 12*s.* 4*d.* should be paid to *Mullett* and *Evans*, on the behalf and for the sole use of *Zacharie* alone, his executors, &c. for the loss sustained by him, in consequence of the capture of the ship *Hope*; all the sums of money so awarded being made payable by three equal yearly instalments, on the 15th of *July* in each year, the first instalment to be paid on the 15th of *July* 1803; that the *British* Parliament granted to his late Majesty a sum sufficient for the payment of the awards, and the money tobe paid under such awards, was imprested by warrant under the sign manual to *Joseph Alcock*, principal clerk of the revenue department; that the awards were delivered to *Mullett* and *Evans*, and they received from *Alcock* on the 15th of *July* 1803, 1979*l.* 14*s.* 7*d.*, being the whole money awarded in respect of the ship *Liberty*, and they also received from *Alcock* the first instalment of the several other sums of money, by the

the other awards made payable, and the residue of such several other sums, to the amount of 10,257*l.* 8*s.* 4*d.* still remained in the hands of *Alcock*; that at the respective times of the captures of the several ships mentioned in the awards, *Coopman* resided at *St. Domingo* as a *French* citizen, and the commissioners considering him as an alien enemy, did not therefore conceive him to be entitled to any relief or compensation, in respect of such ships as joint property.

The bill also stated that *Zacharie* at a Session of the General Assembly of *Maryland*, held at the city of *Annapolis*, from the 6th of *November* 1797, to the 21st of *January* 1798, obtained an act exempting his person from imprisonment, on account of debts due from him as a partner with *Coopman* and *Vochez*, and also in his private capacity for the time, and upon the terms therein mentioned, and by that act *Campbell*, *Williamson*, *Dall*, *Munnickhuyson*, and *Sterrett*, were duly appointed trustees of, and became entitled to his real and personal estates, for the benefit of or in trust for all his creditors, not only in his private individual capacity, but also as a partner with *Coopman* and *Vochez*; that by a letter of attorney under their hands and seals, dated the 3d of *December* 1803, the trustees appointed *John Heathcote* their attorney, for them and for the use of the creditors of *Zacharie*, as a partner with *Coopman* and *Vochez*, and in his individual capacity, to demand from *Mullett* and *Evans*, and from any other person liable, all sums received on account of the first instalment of the several awards which became due on the said 15th of *July* 1803, and an assignment of the several awards to *Heathcote*, for the benefit of the trustees, and also all future instalments of the monies payable by the awards; that at the time the memorials were presented, *Vochez*, with respect to his transactions in this country, was in insolvent circumstances, and had ceased to carry on

 business

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business here, and he continued in such circumstances until the time of his death, and by some deed bearing date on or about the 19th of *August* 1803, he assigned all his estate and effects, and particularly his right and interest in the awards, and the monies thereby made payable to *Philip Langmead, Thomas Mein*, (residing out of the jurisdiction) and *John Compton*, three of his principal creditors, in trust for the benefit of themselves and all others his separate creditors, and for the purpose of making some provision for his maintenance during his life; that *Vochez* died in or about *May* 1804 insolvent, and that no person had taken administration to his estate in case he died intestate, or if he made a will, the same had not been proved, and there was not any legal personal representative of him.

The bill in answer to a pretence by *Mullett* and *Evans*, that they had retained 1629*l*.. 2*s*. 9*d*. of the sums received by them, in discharge of some debts due from *Vochez* alone, and paid the remainder, and by the deed of the 19th of *August*, 1803, assigned the awards and the monies payable thereby, to *Langmead, Mein*, and *Compton*, upon certain trusts for the benefit of themselves, and all other the separate creditors of *Vochez*, after payment of some maintenance to him for his life, and were therefore not then answerable for the money received by them, charged, that such payment and retaining, and assignment, were a breach of trust and a fraud in *Mullett* and *Evans*; that *Zacharie* never signed the deed of the 19th of *August*, 1803, and that if the same bears his signature, it was added thereto by *Vochez*, who had no lawful authority so to do, and that *Mullett* and *Evans*, before they received the money, knew that the house of *Zacharie, Coopman*, and Co. was insolvent, or had stopped payment; that *Langmead, Mein*, and *Compton*, when they received the sum paid by *Mullett* and *Evans*, knew that it was not the

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sole property of *Vochez*, but of him and *Zacharie*, or *Zacharie*'s trustees, and ought not to have distributed more than *Vochez*'s share among his creditors, and that on the 19th of *August*, 1803, *Langmead*, *Mein*, and *Compton*, and *Vochez*, executed a deed of indemnity to *Mullett* and *Evans*, against the consequences of the assignment of the awards, and payment of the money, *Vochez*, without any lawful authority, affixing the signature of *Zacharie*, the power of attorney of the 4th of *November*, 1794, not authorising him to execute that deed, or the deed of assignment in the name of *Zacharie*; and on the payment by *Langmead*, *Mein*, and *Compton*, they received an indemnity from the other creditors of *Vochez*.

The bill prayed that *Mullett* and *Evans*, and also *Langmead*, *Mein*, and *Compton*, might be decreed to pay to the Plaintiff *Heathcote*, on behalf of the other Plaintiffs as trustees, the sum received by *Mullett* and *Evans* for the first instalment of the money made payable by the award which relates to the ship *Hope*, and also the share which belonged to, and formed part of the estate and effects of *Zacharie* of the several other sums of money received by *Mullett* and *Evans*, in respect of the award made in favor of the ship *Liberty*, and for the first instalment of the several sums of money made payable respectively by the several other awards, with interest; and that the award which relates to the *Hope* might be assigned to *Heathcote* on behalf of the other Plaintiffs as trustees, and that the several other awards might be deposited and lodged with one of the masters for safe custody, and for the benefit of all parties interested therein; and an injunction to restrain *Mullett* and *Evans*, and also *Langmead*, *Mein* and *Compton* from receiving, and *Alcock* from paying, the sum of 10,257*l.* 8*s.* 4*d.* in his hands.

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By their answer *Mullett* and *Evans*, admitting that *Zacharie*, *Coopman*, and *Vochez* had in 1793 stopped payment of their debts, stated, that they had not been informed of that event, when the power of attorney was executed to them by *Vochez*, nor till some time in the year 1803; that when they presented the memorials to the commissioners they believed, and still believed, that *Vochez* was in affluent circumstances: that they knew not whether he was insolvent at the time of his death, but that a very large sum then remained due to him on account of his contract with the *French* government; more than sufficient to pay his debts.

Langmead and *Compton*, by their answer denied knowledge or belief, that when the memorials were presented by *Mullett* and *Evans*, *Vochez* was in insolvent circumstances, but stated reasons for believing that he had acquired a large fortune by his contract, and that at his death he was not insolvent, the *French* government being indebted to him 180,000*l.*, and his debts not exceeding 43,000*l.*; that in consequence of the omission of the *French* government to remit to him the sums stipulated by his contract, *Vochez* became unable to pay his debts, and proposed to assign to *Langmead*, *Mein* and *Compton*, as his principal creditors, the awards of the commissioners, and (by a deed in the custody of *Mein*) executed an assignment to them on trust, (subject to certain debts specified, and a sum for his maintenance,) for the benefit of his creditors, affixing thereto the signature of *Zacharie* or *Coopman*, or both of them; denied that they had distributed any sums among themselves, or the separate creditors of *Vochez*, all the funds received by them having been applied by the order and to the use of *Vochez*, according to the agreement; and denied liability to the Plaintiffs.

The

The answer of *Alcock* stated that he had paid to *Mullett* and *Evans*, or their assigns, by virtue of the warrants, ten sums, amounting in the whole to 7108*l.* 8*s.* 8*d.*, and that there was remaining in his hands for the persons entitled thereto under the awards, the sum of 10,257*l.* 8*s.* 4*d.*; which was afterwards paid into court.

The bill having been amended, by their several answers, *Langmead* and *Compton* stated their belief that *Vochez* had advanced to the account of *Zacharie, Coopman* and Co., from his private property, 10,787*l.* 6*s.* 2*d.*, and that *Coopman* was also indebted to *Vochez* on account of his contract, and that *Vochez* had a lien on the awards for those sums, and *Langmead, Mein* and *Compton*, were entitled to deduct those sums from the money accruing due on the awards; and insisted that the money was payable to the sole use of *Zacharie* and *Vochez*.

By the decree, dated the 15th of *March* 1809, the bill was dismissed as against *Alcock*, and it was ordered that the master should take an account of all sums of money received by *Mullett* and *Evans*, or either of them, or by any other person, &c. as and for the first instalment of the money made payable by the award, relating to the ship *Hope;* and an account of the several other sums of money received by *Mullett* and *Evans*, or either of them, &c. in respect of the award made in favour of the ship *Liberty;* and as and for the instalments of the several sums of money made payable by the several other awards; and ascertain how much of what he should find due from them upon taking the last mentioned account, was the proportion or share which belonged to and formed part of the personal estate and effects of *Zacharie;* and the master was likewise to take

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an account of all payments made by *Mullett* and *Evans*, to *Vochez* on account of the partnership of *Zacharie*, *Coopman* and *Vochez*, and on the separate account of *Zacharie*, in respect of the said instalments, and of the award made in favour of the ship *Liberty;* and in case the master should find any accounts settled between *Mullett* and *Evans*, and the said partnership, he was not to disturb the same; and it was ordered that the master should take an account of all sums of money received by *Langmead* and *Compton*, by virtue of the assignment to them of the awards, and also an account of all payments made by them on account of the partnership of *Zacharie*, *Coopman* and *Vochez;* and the master was also to take an account of all the payments made by *Vochez*, on account of his said partnership, and for the separate use of *Zacharie*.

By his report dated the 8th of *February* 1813, the master certified that a state of facts had been laid before him, verified by the examination of *Mullett* and *Evans*, whereby they stated, that they had not received any sums of money as the first instalment of the money made payable by the award respecting the ship *Hope;* nor in respect of the award made in favour of the ship *Liberty;* nor as the instalments of the several sums of money made payable by the several other awards, except the first instalments of the money made payable by the awards in favour of two ships named, for which they admitted to have received 578*l*. 19*s*. 5*d*., and 1050*l*. 3*s*. 4*d*.; that the commissioners appointed under the treaty of amity, commerce and navigation, between his *Britannic* Majesty and the United States of *America*, by two several awards, adjudged that the said two sums should be paid to *Mullett* and *Evans*, for the sole use of *Zacharie* and *Vochez;* and the master found that the sum of 1814*l*.

11*s*.

11s. 4½d., being one moiety of the total of those two sums, was the proportion or share which belonged to and formed part of the personal estate of *Zacharie*; and he found that *Mullett* and *Evans* had paid on account of the partnership of *Zacharie, Coopman* and *Vochez*, for charges and commission in respect of the awards, and for a gratuity to the American consul, 1027*l.* 4*s.* 3*d.*; and that they paid to *Vochez*, on account of the partnership of *Zacharie, Coopman* and *Vochez*, sundry sums, amounting to 880*l.*, and to the separate use of *Zacharie*, for the charges and commission on the ship *Hope*, and for his portion of the gratuity to the *American* consul, the sum of 111*l.* 15*s.* 1*d.*; that *Langmead* and *Compton* had received on account of the first instalment of the several awards, certain sums, amounting to the sum of 5278*l.* 0*s.* 7*d.*; and the master did not find that *Langmead* and *Compton* had made any payments on account of the partnership of *Zacharie, Coopman* and *Vochez*, except the sum of 282*l.* 0*s.* 8*d.* paid to *Mullett* and *Evans*, on account of the balance due to them, in respect of payments made by them on account of the partnership, and thereinbefore mentioned; and he found that *Vochez* had paid on account of the partnership, of *Zacharie, Coopman* and *Vochez*, several sums, amounting to the sum of 8363*l.* 13*s.* 8*d.*; and he did not find that *Vochez* had paid any sum for the separate use of *Zacharie*.

On this day the cause came on for further directions. 1818. *June* 2.

Sir *Samuel Romilly* and Mr. *Wear*, for the Plaintiffs.

Mr. *Hart* and Mr. *Raithby*, for the Defendants.

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July 23.

The MASTER *of the* ROLLS.

I have read the pleadings in this cause, and I think that the important questions which it involves must be more fully argued. The bill calls on the court to distribute a sum of 24,000*l.* stock; and it must be admitted, that if this fund is clearly shown to be the property of the partnership, belonging at once to the three partners, and liable to their joint debts, and if the suit is properly constituted to agitate that question, then no difficulty would occur in the distribution; neither partner could claim it till two sets of accounts had been taken, the accounts of outstanding debts, and the accounts *inter se:* but the questions in this cause are, first, whether this fund is partnership property; secondly, whether the suit is properly constituted to enable the court to decide that point? The former, a difficult question, has not yet been spoken to. The three partners, two residing at *Baltimore*, and the third at *St. Domingo*, were owners of several ships captured; by an article of the treaty of 1794, a mode having been provided for making compensation to *American* citizens, who had sustained losses by capture, for which redress could not otherwise be obtained, memorials were presented on behalf of the three partners to the commissioners appointed by the treaty, specifying several ships. *Zacharie* was sole proprietor of one ship, which was never partnership property, and the Plaintiffs, therefore, who were appointed by an act of assembly to represent *Zacharie*, would be entitled to so much of the fund in question as was the produce of that ship. The commissioners made a distinct award for each ship; all the awards but one relating to ships that had originally belonged to the three partners; but *Zacharie* and *Vochez* being *American* subjects, resident in *Baltimore*, *Coopman* was a French citizen, resident at *St. Domingo*, at the

the time of the capture and of the memorials; on that ground the commissioners were of opinion that he was entitled to no compensation. That opinion might be founded on the principle either that as to so much of the ships as was *French* property, they were rightly captured, or that if they were then *American* property, yet compensation ought not to be now given to an alien enemy. Whatever was the reason, the commissioners refused compensation.

The question which I consider, as requiring, to be argued is, whether the sums thus awarded are the property of the three partners, being the produce of captured ships, which were their property, and two of the partners being *Americans*, and the third a *French* citizen, whom the commissioners intended to exclude; the creditors of the three having an undoubted right against the ships: or are they a new acquisition belonging to the two partners? Supposing that the court would decree the fund between *Zacharie* and *Vochez*, to the exclusion of *Coopman*, it must be observed that, though the assignees of *Vochez* are parties, it appears that he is dead, and no personal representative, who would be entitled to any surplus remaining after payment of debts, is before the court; and it may be doubted whether in his absence the court can dispose of this property. But another point must be considered; is the suit fitly framed for the discussion of the question, whether this fund is partnership property? The bill is filed by persons claiming under *Zacharie* against the assignees of *Vochez*, but I do not find that that preliminary question is raised. It seems taken for granted; and it may be doubted whether there are parties before the court to agitate it.

Another difficulty is created by the decree, respecting which

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which I speak with great deference. It merely directs accounts, and those accounts do not reach the question which I have stated except indirectly; for the accounts directed are against *Mullet* and *Evans*, who insisted that the whole interest of *Vochez* was transferred to them, and that having made large payments on account of this fund, they were entitled to retain the whole. The decree appears to proceed on a different principle, requiring them to account, and directing inquiries what payments they had made on account of the partnership of *Zacharie*, *Vochez* and *Coopman* — a direction which seems to imply that those payments were properly made. Without determining the question, there being nothing in the pleadings to raise it, how the decree could sanction payments of that description, is a point which I wish considered.

Again, no account was directed between *Vochez* and *Zacharie*. It will, I presume, be insisted, that if, as it appears to be assumed, this was partnership property, an account must be taken how much belongs to each of the partners. The only question made on the hearing before me was, whether the Court should direct payment and division among those claiming under the two, or call in the creditors of the three? On reading the pleadings, I am of opinion, that it is impossible to dispose of the case without further inquiry, to whom the fund belongs, and whether the suit is properly constituted for the decision of that question.

1819. *March* 18, 19.

Mr *Bell* and Mr. *Spranger*, for the Plaintiffs.

The only authority applicable to this case is *Thompson*

son v. *Ryan*, in which no judgment has been given by the Lord Chancellor, but the injunction remains undissolved. (*a*) In the absence of direct authorities, the question

(*a*) *Samuel Thompson* of *London*, and *Philip Ryan* resident at *Copenhagen*, were in partnership, the business consisting of the purchase of coffee, sugar, and tobacco at *London* and *Liverpool* by the former, and the sale of those articles at *Copenhagen* by the latter, for the equal benefit of both. In *March*, 1807, *Thompson* purchased a quantity of coffee, sugar, and tobacco, the invoices of which amounted to 24,000*l.*, which was shipped to *Copenhagen* in four vessels and there received by *Ryan*. Some part was sold by him, the proceeds of which he remitted to *England*, and in *September*, 1807, the remainder unsold in his hands of the value of 15,000*l.* was, on the declaration of war between this country and *Denmark*, seised by the *Danish* government; but *Ryan* then resident at *Copenhagen*, representing that he was interested in the goods, one moiety was soon afterwards restored to him, and the other moiety confiscated, and sold for 7000*l.*

About the same time, *Ryan* consigned some *Russian* produce of the value of 15,000*l.*, by a vessel, the property of himself and *Thompson*, to *Leghorn*, for sale, on their joint account The vessel was captured by a *British* cruizer, and in *May* 1808, condemned as lawful prize, but the cargo was restored to *Thompson*, on behalf of himself and *Ryan*, who had lately died.

On his death, *Robert Barnewall* procured limited letters of administration of his goods, and became his personal representative in *England*, and to him *Thompson* paid in respect of *Ryan's* share in the cargo of the ship restored, 6600*l.*, which on the death of *Robert Barnewall*, came into the hands of his executors, *Bartholemew Barnewall* and *Robert Butler*.

Thompson having advanced various sums, to the amount of 906*l.* 13*s.* 6*d.*, on account of *Ryan*, transmitted to his administratrix, for her examination, a statement of accounts, setting forth the sums

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question must be argued on principle. It is settled, that the separate creditors of a partner have no right against the

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sums advanced, by which it appeared that *Thompson* was indebted to *Ryan* in the sum of 1042*l.* 12*s.* 3*d.*; but that account was not signed by *Thompson*, nor considered by him as a final statement of account of his dealings with the Plaintiff, but, as he insisted, contained several errors and omissions; for though *Ryan* was therein credited with his full share of the proceeds of the cargo of the ship condemned, he was not debited with any portion of the loss arising from the confiscation in *Denmark*, nor had he allowed *Thompson* any part of the moiety of the goods so confiscated restored to him, which he had sold at an advanced price.

In *Michaelmas* Term 1816, *Elizabeth Ryan*, the administratrix of *Philip Ryan*, brought an action against *Thompson* for 1042*l.* 12*s.* 3*d.*

The bill filed by *Thompson* prayed an account of all transactions between *Thompson* and *Ryan*, and of all sums paid or received by *Thompson* on account of *Ryan*, or of the joint transactions between them, and of all sums paid or received by *Ryan* on account of *Thompson*, or of the joint transactions between them, and that in taking the account *Ryan* might be charged with the moiety of the coffee and sugar restored to him, or with the proceeds thereof, and that the whole of the transactions between *Thompson* and *Ryan* might be finally liquidated and adjusted, and that *Thompson* might be repaid what should be found due to him from *Ryan* out of the sum of 6600*l.* paid by *Thompson*, and that that sum, or a competent part thereof, might be restored to *Thompson* for that purpose, or otherwise that *Elizabeth Ryan* as the sole legal personal representative of *Philip Ryan*, might be decreed to pay the same out of his effects; that *Barnewall* and *Butler* might be directed to pay the sum of 6600*l.* into the bank, in the name of the accountant-general in trust in the cause, and might in the mean time be restrained by injunction from paying away or disposing of any part of it; and that *Elizabeth Ryan* might be restrained from

the partnership property beyond the separate interest of that partner, his share upon a division of the surplus after

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from proceeding in the action at law.

The answer of *Elizabeth Ryan*, stated her information and belief that a moiety of the goods confiscated was restored to *Ryan*, as being a *Danish* subject, for his own individual use, as his share or proportion of the goods, and that the remainder was confiscated as the property of *Thompson*, who was considered by the *Danish* government a *British* subject, and as such an alien enemy; that she knew not nor could form any belief, whether the goods so restored were afterwards sold; admitted payments by *Thompson* to the representatives of *Ryan* to the amount of 6611*l.* 14*s.* 4*d.*; such payments being made after *Thompson* knew and had notice of the confiscation by the *Danish* government, and of the restitution to *Ryan* of his moiety as the property of a *Danish* subject; and submitted that if *Thompson* was entitled to any proportion of the goods so restored to the possession of *Ryan*, he had not any right as a creditor of *Ryan* to be paid out of his assets in *England*, but must resort to his assets in *Copenhagen* in the hands of the commissioners appointed according to the laws of *Denmark*, for managing his personal estate; and insisted that the account delivered by *Thompson* was final, and contained no errors or omissions, and that *Thompson* had agreed to pay the balance, and had given directions for preparing a release.

On the 25th of *Nov.* 1816, it was ordered that service of the subpœna on the Defendant *Elizabeth Ryan*'s attorney at law, should be deemed good service on the Defendant, Reg. Lib. B. 1816, fol. 43; on the 14th of *December* 1816, an injunction was granted for want of answer; on the 11th of *April* 1817, the answer having been filed, it was ordered that the injunction be dissolved, unless cause shown on the first day of next term, Reg. Lib. B. 1816, fol. 680.; and on the 23d of *April* 1817, the time to show cause was enlarged for a week.

On showing cause against dissolving the injunction, it was

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after payment of the partnership debts — *Taylor* v. *Fields.* (*a*) In order to determine whether that rule is applicable to the present case, it becomes necessary to consider the principles on which it rests. One principle is, that, by the nature of the contract between the partners, partnership property must be first applied to partnership purposes, and, among other purposes, to the payment of partnership debts; and it would be a breach of contract to apply it otherwise without the consent of all the partners — *Shirreff* v. *Wilks.* (*b*) The equity of the creditors is founded, as Lord *Eldon* has repeatedly stated, on the equity of the partners. Another principle is, *qui sentit commodum, sentire debet et onus;* as the partnership property has been acquired by means of partnership debts, it ought first to be applied in discharge of them. A third principle may be, that, if one partner has paid more than his proportion, the first object, after payment of the partnership debts is, to place the partners on an equality, by reimbursing the advance; a principle constantly adopted in courts of equity: and the right is the same, whether the division is prior or subsequent to the payment of the debts. These principles apply when the property of three partners becomes, by death or assignment, the property of two; it is still subject to partnership claims, and can never be divisible till they are satisfied; nor can it be exempted from those claims except with the concurrence of all the partners — *Ex parte Ruffin.* (*c*)

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was suggested that a case should be stated for the opinion of a court of law, but the parties could not agree on a statement; and no farther proceedings appear in the cause.

(*a*) 4 *Ves.* 396.

(*b*) 1 *East,* 48.

(*c*) 6 *Ves.* 119.

The

The question here is, whether the present case shall form an exception to these rules? The circumstance that the share of one partner, as an alien enemy, is annihilated, cannot affect the equity of the remaining partners, or of the partnership creditors through them. In the case of forfeiture for treason, the Crown would take the interest of the criminal partner, still subject to the claims of the joint creditors. The accident, or the crime, of becoming an alien enemy, cannot deprive the other partners of their previous rights. *Zacharie* is entitled to insist, that before the assignees of *Vochez* receive any part of this sum, the partnership debts, to which *Zackarie* is liable, shall be discharged. For many purposes a partnership continues after dissolution, as in *Tarleton* v. *Backhouse* (*a*), before Lord *Ellenborough*, and on a motion for a new trial, before Lord *Eldon*, where a commission of bankrupt was sustained against a partnership on a debt contracted many years after dissolution, the sale of partnership goods having been continued.

The sums awarded are partnership property; they are given under the treaty as an indemnity to the partnership; but the share of one partner happens to be intercepted. The treaty designed not a bounty, but an act of moral justice, to place the partners *in statu quo*. The intention of the commissioners was to reserve the share which they conceived to have devolved to the Crown, but not that the remainder should be distributable otherwise than if the whole had been paid.

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If a partnership sustained an accidental loss, as by fire, and an individual were to make a donation to two

(*a*) Probably connected with *Ex parte Tarleton*, 19 *Ves.* 464.

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of the partners, in compensation of their loss, would that be partnership property?

Argument for the Plaintiff resumed.

On that point *Larazzabel* v. *Gorbea*, recently decided in this Court, is applicable; but it may be admitted, that such a donation to the two partners would not be partnership property; here the sum awarded is purchased by the loss of partnership property; the treaty expressly acknowledges in the partners a right, for which they could not obtain satisfaction in the ordinary course. This is not a gratuitous gift, but a satisfaction in consideration of a loss for which the parties were, under the treaty, entitled to compensation, analogous to damages recovered from the hundred by a partnership which has been robbed. In what proportion would this sum be divisible between the two? Not equally, but in the ratio of their respective interest in the partnership.

Assuming that the fund is subject to the partnership debts, the absence of one of the partners out of the jurisdiction, will not prevent taking the partnership accounts, and the suit is properly framed for that purpose. The Plaintiffs suing as assignees of one of the partners, the Court must first ascertain that the partnership debts are paid, as in an ordinary bill for an account and division of partnership property.

Mr. *Hart*, Mr. *Martin*, and Mr. *Raithby*, for the Defendants, the assignees of *Vochez*.

It is admitted that the partnership creditors have no lien on this fund, and that their equity can be made effectual only through the equity of the partners; yet it is insisted that the existence of creditors creates an equity

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in the partners. If what was partnership property has become the separate property of a partner, as by *bonâ fide* investment in land for his benefit, the joint creditors have no claim against it, in preference to the separate creditors.

In this case the interest of the partnership in the ships was determined by the capture; the distinction is familiar between what are called treaty cases, in which the claimants have no legal right, and cases of contested capture, where the validity of the detention is in dispute. Before the award of the commissioners none of the parties had any transmissible or assignable right in the ships, or the sum to be awarded in respect of them. *Coopman*, an alien enemy, could have maintained no suit. A contract, express or implied, by *Zacharie* and *Vochez*, to hold in trust for *Coopman*, would be a fraud on the commissioners, judges without appeal of the facts and justice of the case.

Here is neither restitution which supposes the identity of the subject matter; nor compensation, which supposes obligation. (*a*)

Mr. *Duckworth*, for *Mullet* and *Evans*, represented that they had rendered an account with which all parties were satisfied.

The Master *of the* Rolls.

The claim, as I understand it, now advanced by the Plaintiffs, is to have an account taken of the joint debts *March* 19

(*a*) The substance of the argument for the Defendants is stated in the judgment.

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of the three partners, before any division is made of this fund, insisting that it is liable to the ordinary equity attaching on partnership property, not to be divided among the partners till the partnership debts have been satisfied. In the argument it seems to have been admitted that *Coopman* himself has no interest in this property; that if he were an individual claimant, there being no joint creditors, he would be concluded by the nature of the grant; but it is contended, that still the joint creditors ought to be called in for the sake of the other two partners, and that in taking the account between them, there is that equity affecting each of the three, that every partner shall be discharged from his liability in respect of partnership debts, before any division of the funds liable to those debts between the partners. The first question is, whether the bill is properly framed? the second, whether on the merits the Plaintiffs are entitled to the relief claimed?

It seems that this point of great novelty had not offered itself in the prior stages of the cause. The bill contains not the least hint of the question, which is now the subject of this elaborate argument. The general nature of the bill is, that the assignees of *Zacharie* call for an account against two descriptions of persons; those who represent *Vochez*, the other neutral partner, and *Mullett* and *Evans*; (who were possessed of part of the fund, and had endeavoured to protect themselves from accounting, by insisting that they had made payments to the separate creditors of *Vochez*, and to himself after he had traded in this country, and were entitled to retain the residue,) and seek to bring the fund into court from the hands of the Defendant *Alcock*, to give to *Zacharie*'s representatives that proportion which appears to be due to him, as sole owner of one of the ships, and as a co-partner in the others. From the beginning to the end,

end, there is no hint that *Coopman*, or any one claiming under him, has an interest; on the contrary, the bill seems to allege, as a reason for excluding him, that at the time of the capture, he resided at *St. Domingo*, and was therefore excluded by the terms of the award. The relief sought by the Plaintiffs therefore is an account and division, not suggesting that any one has a right to a share but *Zacharie* and *Vochez*; the Defendants meeting this claim, insist also that the parties entitled to divide, are *Zacharie* and *Vochez*, but object to go into the accounts.

In considering the case, it must be remembered, that the ships were, during the co-partnership in 1793, and at the time of the capture, the property of the three, not merely as part owners, but as partners in trade; a portion of the joint stock of the three; and for this purpose it is immaterial to what country they belonged: in that state, all the principles so ably urged on the part of the Plaintiffs undoubtedly attach on the ships. The rights of creditors in such a case are indisputable; a long series of authorities has established the equities of creditors, to be worked out through the medium of the partners. They have no lien, but something approaching to lien; that is, a right to sue, and by judgment and execution to obtain possession of the property; but till then, they cannot prevent the partners from effectually transferring it by *boná fide* alienation. Is it clear from *Ex parte Ruffin* (a), and other cases, that where a partner conveys joint property, the circumstance of its having been joint property, does not render it such for ever, or prevent its being effectually aliened to two, or one of the partners. If, by *boná fide* con-

Equity of joint creditors against the partnership property.

(a) 6 *Ves.* 127. *Ex parte Fell*, 1 *Rose*, 416. *Ex parte Harris*, 10 *Ves.* 347. *Ex parte Williams*, 1 *Madd.* 585. 11 *Ves.* 3. *Ex parte Rowlandson*,

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veyance, a new purchaser is put into possession, he is to all intents and purposes the owner, and joint creditors cannot follow the property into his hands.

Such being the general rule, in 1793 the captures take place. It is immaterial for the present, whether the captures were legal or illegal; on that subject we are precluded from inquiry, and know not on what ground and in what circumstances the capture was made, under what flag the ships sailed, in what commerce they were engaged, on what principle taken, or where condemned. The Court knows only the capture and condemnation, and the fact, that two shares in the ships belonged to *Americans*, and the third to a *French* subject resident at *St. Domingo*. Capture and condemnation having taken place, though I agree with the argument, that we must refer to the treaty to determine, whether the case is within its provisions, which it would not be unless the capture was illegal, or in circumstances within the operation of the seventh article, still it must be assumed, that it was a case in which the parties were not entitled to any remedy in any municipal court. The property, therefore, was lost and gone by the adjudication of a competent tribunal; and it was not in the power of the individuals to recover it, and reverse the sentence of condemnation. The ships had irrevocably passed into the hands of the captors, and become their absolute property.

Stopping here, whatever antecedent rights the joint creditors had in the property, whatever right of suing for it, while it remained the property of the partners, here every right was gone; the maritime tribunal, by sentence *in rem*, had determined the ships to be no longer their property, but that of another: the appli-

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cation for relief under the treaty assumes, that the parties were without remedy in any municipal court. Thus far, therefore, this case differs from *Thompson* v. *Ryan* (a), in these circumstances; *there* was restitution to the partner residing in *Copenhagen*, of the goods that had been seized there as the property of a *British* subject; they were restored to *Ryan*: that is restitution of the thing itself; that which once belonged to the copartners was in part restored; the right of the captor, or his officer, is taken from him; the property was never suffered to pass into his hands, but saved from confiscation by the circumstance of *Ryan* being interested in it. *Pro tanto*, no confiscation took place. It may be a very important question, whether, in such a case, the property has been changed between the partners; the *res ipsa* being restored, and in the hands of one of the partners, whether the other partner may not claim his share? The very thing which once had impressed on it the character of partnership property, remains *in solido* in the possession of one partner untouched by the sentence of condemnation. Here the thing is irrevocably gone; the sentence not being subject to reversal by any suit that could be instituted in any municipal court. (b)

In that state the parties remained for ten years, from 1793 to 1803, when the awards were made. In the *interim* the ships had passed into other hands, and there has never been any restitution of them. By the treaty, not of peace, but of amity and commerce, concluded in 1794 between *America* and this country, complaint having been made by *Americans* of illegal captures during the war, one of the contracting powers engages that com-

(a) *Ante*, p. 567. n. (b) *Vide post*, p. 588.

missioners

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missioners shall be appointed to inquire into those cases, and make compensation to the parties.

Nature of legal right.

It is said, that the sums awarded by the commissioners are not matter of bounty or donation; can they be matter of right? What is right? That which may be enforced in a court of justice. Had the parties whose property was condemned by irrevocable sentence, any right? What they obtain after that condemnation is not founded in right, but in policy between the nations, providing compensation to individuals who have lost property by sentences which are thought unjust: the ground of relief before the commissioners is the want of redress in any municipal court. Whatever the individual obtains is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without any thing in the nature of consideration, yet, for the purpose of being contrasted with property or right, it is donation, not restoration of a former right, but from a new fund, belonging to an independent authority, a grant to the sufferer for what he lost. The inducements for one nation to give to the citizens of another this bounty, are matter of liberality and conciliation, but not of strict legal right. It may be said, that there is a moral obligation to rescind an unjust sentence; if so, it is one of those imperfect obligations which cannot be judicially enforced."

This, therefore, is not a case in which property is recovered in a court of law, by the medium of a sentence, and as matter of right. The parties claim, not the thing itself, but compensation: making application to indulgence for an equivalent, cannot be assimilated to recovery by right in adverse litigation. All persons receiving benefit under this commission succeed not in virtue of any consideration

sideration moving from them; but by an article of a treaty, which gives as bounty from this nation to *American* citizens, a compensation for losses. It is extremely material to consider in what character this grant was made, for on that depend the consequential rights. A power is given to the commissioners, final and absolute, to grant or to refuse relief to any individual, and in any circumstances, as they may think fit; and whatever they adjudicate cannot be questioned.

Vochez arrived here in 1795, engaging in a distinct trade, and the trade of the three was never afterwards revived. They were insolvent, and stopped payment in 1794. By an act of assembly in 1798, the property of *Zacharie* was conveyed for the benefit of his creditors. All these transactions were prior even to the application for relief under the treaty; at length, in 1798, four years after the treaty, *Mullet* and *Evans* preferred memorials to the commissioners, not omitting the claim of *Coopman*. The memorial is presented in his behalf, stating incorrectly, that all the partners were *American* subjects; the fact, that *Coopman* was a *French* citizen, being discovered, the commissioners adjudicated a sum to the two only, for their sole use, expressly negativing the claim of *Coopnam*, and bestowing on the two a pecuniary compensation. On what ground they proceeded we know not; it is difficult to conceive how, in a case of restitution, *Coopman*, an alien enemy at the time of the capture, could have had a share; but it is enough to say, that the award, which is conclusive on all parties, gave to the two and not to the third. The question is, what is the effect of this grant?

First, I ask, who are entitled to the money? It is impossible to contend that this grant made *Coopman* a participator. It is admitted that it must be taken as an exclusive

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exclusive grant to the two *American* subjects, with a negative against participation by *Coopman*. His share, if he ever had one, was gone; and the other two are to receive their proportions exactly as if *Coopman's* share were satisfied. When once it is admitted that the right of property under this grant was, at law and in equity, with the two, and not with the three, I think it will be exceedingly difficult to prevent the obvious consequences. It would be a perfect anomaly, and contrary to every principle, to hold, that the creditors of the three have any right on the property of the two. The joint property of the three is subject to the joint debts of the three, and the property of the two, by the known law, is subject to their respective classes of creditors. If *Zacharie* and *Vochez* had been engaged in a distinct partnership of two, and also in a partnership of three, when this property was first created and given to the two, and admitted to be their absolute property, in law and equity, on what grounds could the creditors of the two be postponed to the creditors of the three? The right of the creditors of the three can attach only on the co-extensive property of the three; they have no more right to charge the property of the two than the property of one. It was acknowledged, and could not be denied, that the equity of creditors, in any case, must be worked out through the medium of each partner; the difficulty then is, it being admitted that *Coopman*, one of the partners, has no right in this property, that it neither is nor ever was his, to know on what principle he can give to his creditors what he has not himself? His creditors claim through his medium only, as a partner, and admitting that he has no right, can they be in a better state? It is conceded, that, if this were surplus, *Coopman* could not claim in competition with the two: then it is not joint property. It wants the essential character of joint property unless it belongs to the three. Belonging to the

the two only, if *Coopman's* creditors are admitted, the consequence is, that he will be exonerated by this fund from the weight of debt which he must otherwise bear; that a sum given to two shall operate in favour of the third, in contradiction to the terms of the grant, which are to the sole use of *Zacharie* and *Vochez*, nothing being stated that denotes an intention at variance with those terms: it being clear, on the contrary, that the commissioners intended that *Coopman*, by reason of his personal disability, should not be benefited; having occasioned the loss by his character of alien enemy, and his proportion having been rightly condemned, they meant to except him, and to give to the two exclusively. Why then are we to construe the two to be trustees for that very third, who, by the terms of the grant, is excluded? If they are declared trustees, must it not be on the ground that they were intended to be trustees? How can a trust be raised, not only not in conformity, but in contradiction, to the terms and the design of the grant?

It was then insisted that an account must be taken of the debts of the three for the purpose of dividing the property between the two, and also the accounts of the three partners *inter se*. Supposing that, in the result, it appeared that *Coopman* alone was a creditor of the partnership, the other partners being debtors, could the Court, he being subject to pay the debts, give to him the surplus for that purpose? Was an account over taken between three, each of whom was not equally interested in the result? an account of a partnership of three, including two, and excluding the third? Yet it is contended that it ought to be taken for the benefit of the two, while it is admitted, that, as to the third, it cannot be pursued, because he is, by the grant, excluded from participation.

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In order to raise this point, *Coopman* should have been a party. How can an account be taken of a partnership in the absence of one of the partners, the pleadings not stating that he is out of the jurisdiction, but that, as an alien enemy, he was excluded from the grant of the fund to be distributed? The claim of *Coopman*, now introduced, creates these difficulties and this anomaly.

The case of *Thompson* v. *Ryan* is distinguishable in the circumstance that I have stated. The principle on which this case depends is, that the fund in question is for the first time created by the award, and though, in some respects, arising out of the antecedent capture of joint property, yet not connected with it, as a continued claim of property, pursued in the usual course in which right is ascertained. It is more analogous to gifts by individuals to one of several partners, in case of casual loss to the partnership; a grant to one and not to the rest. It seems admitted, that, in such a case, it would be impossible to attach to the gift the incidents of partnership property, more than to a legacy to one or two of these partners in compensation of losses by war. The distinction is, that this is no part of the partnership property, but for the first time brought into *esse* by a parliamentary grant; as much the separate property of those to whom it is awarded, as if they had acquired it by any other means. To say, that, in equity, the partnership creditors could follow it, would be to carry that doctrine beyond any authority. When the property is changed, the equity is gone. The creditors, not pursuing it while joint property, have lost their right when it passes into other hands. The principle on which joint property is liable, namely, credit given, is not applicable to this fund, which came into unexpected existence by the effect of the treaty; bestowed on the two, not on the three, it was

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not commensurate with partnership property, nor succeeded to the place of it, but quite distinct and independent, belonging to different individuals. 1819. CAMPBELL v. MULLETT.

These are the difficulties at present occurring to me against considering this as property of the partnership, or over which the partnership creditors have any equity. Whatever else is to be done with it, what division is to be made between *Zacharie* and *Vochez*, or what farther consequences, remains to be considered. I cannot declare that the creditors of *Coopman* have any interest in a fund which I think does not belong to him.

The MASTER *of the* ROLLS.

I retain the opinion which I expressed on the hearing. I think that the joint creditors of *Zacharie*, *Coopman*, and *Vochez*, have no equity against the fund. It must be considered as the property of *Zacharie* and *Vochez* only; by the terms of the award it is given to them, and *Coopman* is expressly excluded. The argument, that the ships, being originally joint property, the sum awarded in compensation of their capture must be, like that out of which it grows, joint property, goes too far. On that principle the property must be joint for all purposes, and between the partners as well as for the creditors. Clearly and confessedly, however, this fund is not joint property between the partners. But it is a fallacy in reasoning to suppose it a substitute for joint property; it is a substitute for separate property. A division into parts was necessary before the commissioners could award any compensation. The ships had been condemned, and could never be restored. Considering that the share of the French partner was included in the condemnation, the only way of awarding a compensa- March 24.

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tion to the others was, first to make a division to ascertain the interest of the alien enemy, and, placing that out of the question, to bestow a gift on the two *Americans*. The compensation is therefore given, not for joint, but for separate property; commensurate with, and adequate to, the interest of the two, in the event of a division. Supposing that they had sold their shares, and invested the amount in stock, could it have been said that that stock was joint property, because produced by it? Where there is a conversion of joint property by a valid act, it is a fallacy to consider it still joint. The question will always be, whether, with regard to creditors, the act is valid? If a bale of goods, belonging to three partners, is sold, the price is not necessarily the property of the three, because the bale was their property. The question is, was the transaction a fair conversion.

This case proceeds a step farther; there neither was nor could be restitution of the ships; it could not be intended that the French partner should have a portion; by the terms of the treaty the commissioners were bound to exclude him: not being at liberty to bestow any share on the alien enemy, they were under the necessity of negativing the joint claim, and of giving to the two partners only as individuals. By every mode of analysis and construction therefore, the examination, of the award operates to prove what the terms shew, that the fund awarded is separate, not joint property. When that is established the consequences are obvious. I think that this fund is, what, by the reference, it was intended to be, what, by the terms of the award, it is declared to be, what alone it legally could be, separate property. By the award the joint creditors are not placed in a worse situation; the joint property was already lost. If the very joint stock, or a part of it, as in *Thompson* v. *Ryan*, had

had been restored, there would have been nothing to alter the property; the goods are returned, *in statu quo*, the property of the partners; but here the ships are gone, and never restored, and the question concerns a new property come to the two in the way of compensation. That is far removed from a case of restitution. Restitution might have made it still joint property; compensation considers only the individual shares, and gives in the proportion of their interests individually to the two. There is no more ground for admitting the joint creditors than *Coopman*.

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The argument that the two partners may have unequal interests in the joint property, and that the commissioners may have given to them two-thirds of the value, believing them entitled in proportions different from the fact, cannot now be urged. We must abide by the words of the award, which the treaty declared to be final and conclusive.

I think that there is no doctrine of equity qualifying the right of the two partners, and that, as the fund is not a property in which *Coopman* has an interest, it is not subject to the claims of the joint creditors. (*a*)

(*a*) The following report of *Skipp* v. *Harwood*, (cited by Lord *Mansfield* from his own note in *Fox* v. *Hanbury*, *Cowp.* 449., and reported on another point, 3 *Atk.* 561.) is extracted from a MS. in the possession of the Editor.

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Trinity Term,
21 *Geo.* 2.
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SKIPP *v.* HARWOOD and Others, *et è contra.*

Rights of the separate creditor of one partner, against the partnership property.

"Messrs. *Harwood* and *Skipp* were partners in the trade of a brewer, and *Harwood* being justly indebted to his sisters, he gave them a warrant of attorney to confess judgment for securing the debt. The sisters enter up judgment, and, by execution sued out thereon, the sheriff takes the separate effects of *Harwood,* and also one moiety of the partnership goods, which (at the time of the seizure) were in *Harwood*'s custody, and delivers back a moiety thereof to the other partner; and the sisters suffer *Harwood* still to keep the goods taken in execution, and to trade with them; the judgment being given by him to his sisters to protect his goods against other creditors.

Upon a bill and cross bill brought by the partner, &c., for an account of the trade, and satisfaction for mutual breaches of covenant, &c., the principal question was, whether the goods taken in execution are not subject to the debts and demands of *Skipp* (the other partner), due on the partnership account, before the sister's debt?

And it was argued by Mr. *Noel,* for the sisters, that by taking the goods in execution (especially as they were solely in the hands of the debtor), a specific lien is laid thereon, and therefore these creditors ought primarily to be satisfied, and if in such a case, the partnership goods should be subjected to the demands of the other partners, especially such as were not liquidated, it would be attended with great inconveniency; for then the creditors, suing out execution, might be overhauled in Chancery, and (perhaps) recover nothing in the event, and yet the person of the debtor will be discharged by taking out a *fieri facias* or *elegit;* there would therefore be no safety in having any thing to do with partners. And it was urged in answer to the objection made by the Plaintiff's counsel, that the judgment was fraudulent, because it was confessed to defraud the other partner, and therefore the goods shall remain in *Harwood*'s hands; and therefore it was not *bonâ fide* according to *Twyne*'s case (*Co.* 3.80. b.) that the consideration therefore

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therefore was good, and it being sworn only that some part of the partnership goods taken in execution, and retained by the sheriff, (without saying what) were used by the partners, it is unreasonable that this should make the whole transaction void as collusive: besides if these goods were used, *Skipp* had the benefit thereof.

Lord Chancellor said, that the share taken in execution was liable, in the first place, to all such demands as the other partner had against *Harwood*, on the partnership account, either in law or equity, antecedent to the execution; but not to such demands as he might have on a separate account, nor to such as were subsequent to the execution; because, as to the goods taken in execution, the partnership ended thereupon, and the creditor became a tenant in common with the other partner. And as to the goods being taken out of *Harwood*'s possession, this was immaterial, because that in the case of chattels follows the property, which was here joint, and therefore the possession must be so too. He also said, that here the whole partnership goods should have been taken, and a moiety delivered back; and so is Lord *Holt*'s opinion. — 1 *Salk*. 392. (*a*) and 1 *Show*, 174. (*b*)

The case was, however, adjourned for the parties to agree; but they not agreeing, the Lord Chancellor afterwards this Term pronounced his final opinion as follows:

Supposing the judgment to be a fair one, the creditors taking out execution could not be in a better condition than the debtor himself; and they must take the goods exactly in the same state as the debtor had them, that is, subject to the partnership demands; by the seizure of the goods, the jointure between the partners was severed, and the creditors became tenants in common with the other partner. But now as to the judgment itself, supposing the consideration to be a good one, yet the creditors suffering *Harwood* to continue in the possession of them after the *elegit*, is a badge of fraud, and destroys the *bona fides* of the transaction according to *Twyne*'s case; and besides this, it appears that they took a confession of the judgment in order to protect their brother's goods against another creditor; so that

(*a*) *Haydon* v. *Haydon*.

(*b*) *Bachurst* v. *Clinkard*.

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they cannot be considered as coming in *bonâ fide*. I shall, however, consider the sisters as partners with *Skipp*, and *Harwood* as their agent, and shall make them parties to the account. It is no objection that the goods taken in execution have been since frequently changed, for the specific lien which the other partner had on those goods, devolves on those which have been taken in the place thereof, and always continues. (*a*) And so it is in the case of a mortgage of stock, and goods in trade, for in such case if the lien was to fall on the goods in trade when the mortgage was made, and not on those taken afterwards, the trade must stop.

Lord Chancellor decreed accordingly, that an account be taken between the partners, and between them and the sisters, on the foot of the partnership articles, and that the master inquire what breaches of covenant have been made by the partners, and what damages sustained thereby, and that such damages be brought into the account, &c.; and also that an account be taken of the partnership debts, and *Skipp*'s proportion paid him, with interest. Decreed also that *Sleorgin*, (a party to one of the bills, and a servant of the partnership, who was to receive money and pass accounts;) make up an account before the master, if he hath never stated it before, but if he has, it is not to be unravelled; that a receiver be appointed to receive the debts of the partnership, and bring execution for the same in the name of the partners, &c. and that Defendants, the *Harwoods*, pay the Plaintiff his costs in the first cause to this time, (on account of the gross breaches of covenant committed by them and their great misbehaviour;) and that the costs of the cross bill and the subsequent costs be generally reserved," &c.

The entry in the Registrar's book of the decree on the hearing, Reg. Lib. B. 1746. fol. 522—528. agrees in substance with the preceding statement; the order appointing a receiver may be found, *ibid.* fol. 383. and orders restraining removal of partnership goods, *ibid.* fol. 410. and committing one of the Defendants for contempt, *ibid.* fol. 429.

(*a*) *Vide ante*, p. 577.

APPENDIX.

APPENDIX.

Of the following cases, the first, connected with the doctrines discussed in *The Attorney-General* v. *Warren*, ante, p. 291., was not previously to be found in print. The two succeeding Cases, of both which the printed accounts are extremely imperfect, have been extracted from Lord *Nottingham's* MSS., *vide ante*, p. 83. The former, *Grey* v. *Grey*, (1 *Ca.* in *Cha.* 296. *Reports tempore Finch*, 338. 2 *Freem.* 6.) is one of the earliest and most important authorities on the doctrine of advancement, in application to purchases by a father in the name of his son; a doctrine considered in *Murless* v. *Franklin*, *ante*, vol. 1. p. 13. The latter, *Salsbury* v. *Bagot*, (1 *Ca.* in *Cha.* 278. 2 *Freem.* 21.) has been the subject of much remark, 1 *Schoales* and *Lefr.* 47. and affords material illustration of the principles discussed in the late case of *Cholmondeley* v. *Clinton*, 2 *Jac.* and *Walk.* 1.—206. A reference to the entry in the Registrar's book is inserted, *ibid.* 47. n.

"ATTORNEY GENERAL *ex relatione* REID *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF STAMFORD *& al.*

Easter Term, 20 Geo. 2. 1747.

INFORMATION against the Mayor, Aldermen, and Burgesses of *Stamford*, the representatives of some of the preceding mayors, the lessee and tenants of the charity lands, the representatives of the late schoolmaster, for the misemployment of the profits of certain lands

A charity established, on an information praying relief which is refused. Leases by trustees of a charity.

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lands given to the free school at *Stamford*, (whereof the Mayor, Aldermen and Burgesses were heretofore trustees, and now the Mayor solely,) particularly in applying part of the rents for the benefit of the corporation.

And it was laid down by Lord Chancellor; 1. That where a lease is made by trustees at an undervalue, by collusion between them and the lessee, this court can not only make a decree against the trustees, but also against the lessees for the surplus money; but this is to be done only where the circumstances of such collusion are very strong. 2. That where power is given to the trustees of a charity to make leases generally, (as in this case,) they have a power both in law and equity, either to take fines or reserve rents, as is most beneficial for the charity. 3. That where in the donation the feoffees are directed to apply the rents towards the necessary finding a master, and for the pains of such master, and they apply part of the profits towards rebuilding and repairing the school-room and school-house, this is a good pursuance of the trust, because a school-room and house are necessary, and if these are not provided by the trustees, they must be provided by the master himself, and so it is (in effect) applied for the pains of the master; and here the words of the donation being, that Mr. *Ratcliffe*, " Intending to found and erect a school," &c.; these seem to shew that a new school was to be built. 4. That (in this case) in the leases made by the Mayor, Aldermen and Burgesses (the trustees), there being covenants from the lessees, for grinding at the corporation mill, such covenants were improper, and ought not to be inserted. 5. That though this information, as to the matter of relief, ought to be dismissed, (there being no misapplication of the rents or collusion,) yet as this charity was never established either by a commission of charitable uses or by decree, it is now proper

proper to establish it; and Lord Chancellor mentioned the case of Dr. *Friend*, and the Dean and Chapter of *Westminster*, (when *Sir Robert Raymond* was Attorney-General,) when the same thing was done.

The information as against the representatives of the past Mayor of *Stamford*, and the late school-master and the lessees, was dismissed with costs, (no misbehaviour being proved against them,) but as against the corporation of *Stamford*, without costs (*a*), (on account of an order made by them, that in the charity leases there should be covenants for grinding at their mill;) and Lord Chancellor said he would not give costs for this reason, rather *in terrorem*, than because the charity, suffered by such order; and Lord Chancellor declared the charity to be established, and decreed the same accordingly; and it was referred to the master to consider what is the properest way of making leases, and of keeping the school-room and house in repair, and report the same."

His Lordship doth order that the information do stand dismissed out of this Court, as against the Defendants *Turner* and *Hawes*, with forty shillings costs, according to the course of the Court, the cause as to them being heard on bill and answer; and that the information do also stand dismissed out of this Court, as against all the other Defendants, except the Defendants, the Mayor and Aldermen and capital Burgesses of the borough of *Stamford*, in their corporate capacity, with costs to be taxed, &c.; and as between the relator and the Defendants, the Mayor, &c., in their corporate capacity, his Lordship doth declare that the said charity ought to be established, and doth order and decree the

(*a*) As against the Corporation the information was retained; see the decree.

same

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same accordingly; and that it be referred to the said master to consider what may be the most proper method of granting leases of the said charity estate for the future, and in what manner the school-house, and the school-master's house, ought, for the future, to be kept in repair, &c. and as between the relator and the Mayor, &c. in their corporate capacity, no costs to this time are to be paid, but his Lordship doth reserve the consideration of the subsequent costs between them, &c.

Reg. Lib. A. 1746. fol. 621 — 624.

26th March, 29 *Car.* 2. 1677.

" FORD LORD GREY, - PLAINTIFF.
KATHERINE LADY GREY, DEFENDANT.

AND

KATHERINE, RALPH, and CHARLES GREY, INFANTS, - - - - PLAINTIFFS.
FORD LORD GREY, and KATHERINE LADY GREY, - - - - DEFENDANTS.

Purchase by a father in the name of his son, an advancement.

THESE cases involve the concerns of a family, in which I would be glad to avoid the delivery of any opinion, because I foresee that a victory on either side can never produce the peace of it, but will rather occasion great, and perhaps endless breaches. The case is a very short one, but of a very nice and curious debate.

William Lord *Grey* purchases *Gosfield* in the name of *Thomas Grey,* his eldest son, without any trust declared; whether, upon the whole matter, with all its circumstances, this be a provision for *Thomas Grey,* the son, by way of advancement, or a trust for the Lord *William* *Grey?*

Grey? What judgment soever be given in this case, it must wound the honour, and perplex the interests of the family. 1st. The honour of the family will be wounded every way; for if it be a trust, as the now Lord *Grey* would have it, then the 6000*l.* charged on *Gosfield* by *Ralph* Lord *Grey* fails, and is become unjust and illegal, and so the honour of the Plaintiff's father lies at stake; on the other side, if it be an advancement and no trust, as the widow would have it, then all the provisions made by *William* Lord *Grey* to incumber *Gosfield*, will fail as to *Gosfield*, and so the honour of the grandfather lies at stake. 2d. Again, the interests of the family will be perplexed; for if it be a trust, as the now Lord *Grey* would have it, then *Katherine*, *Ralph*, and *Charles*, will lose their 2000*l.* a-piece charged on *Gosfield* by the Lord *Ralph*; and, moreover, 4000*l.* more given by Lord *William* to *Katherine*, and transferred by the Lord *Ralph* from a charge on the personal estate of the Lord *William*, to be a real charge upon *Gosfield*, falls hence to *Gosfield*, for the Lord *William*, if he was *cestui que trust*, has so settled it, that Lord *Ralph* was but tenant for life; so that question affects the now Lord *Grey* 10,000*l.* deep in point of interest. On the other side, if it be an advancement, as the widow would have it, then all the charges laid on *Gosfield*, *inter alia*, by the Lord *William*, fall hence to *Gosfield*; and the consequence of that consequence is, 1st. The 6000*l.* a-piece, given by the Lord *William* to *Ralph* and *Charles*, the grandchildren, must charge other lands, not *Gosfield*. 2d. *Gosfield* will be so much the abler to bear the 2000*l.* a-piece charged upon it by the Lord *Ralph* to his three younger children. 3d. And also the 4000*l.* more transferred from the Lord *William*'s personal estate to *Gosfield*, for *Katherine*'s portion. 4th. And then the remainders in tail to *Charles* Lord *Grey* of *Rollston*, and *Katherine*, his lady, will also fail, which is a valuable possibility,

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possibility, though never so remote. To make this easy to the Court, and honourable to himself the Lord *Grey* advances so far as to offer to pay the 6000*l.* charged by his father on *Gosfield* for the three younger children, and the 6000*l.* a-piece charged by his grandfather for the two younger grandsons, and 1000*l.* more of the 4000*l.* transferred by his father upon *Gosfield*, leaving the rest of his sister's portions to his mother, who has two or three personal estates to help her, viz. Lord *William*'s, Lord *Ralph*'s, and *Thomas Grey*'s. By this offer *Ford* Lord *Grey* takes upon himself 19,000*l.*, so as to him the loss would not be great if judgment was given against him. The widow, to acquit herself, offered to pay 3000*l.* to her daughters, and all the debts and legacies of Lord *William* and Lord *Ralph*, and to free her son from the creditors, so as she might enjoy her jointure, and be assisted in the getting in the personal estate, and both might account for their receipts. By this offer, the loss, as to the widow, would not be great, though judgment were given against her, and yet perhaps the offer is not great neither; but whatever the agreement be, the personal estate must come into the reckoning. An agreement thus far advanced is now broken off, I will not inquire how, but am bound to give judgment, since both sides demand it. I will, *ergo*, first state the facts and the evidences on both sides; then I will deliver my opinion what the law is upon those facts.

The evidence to prove this purchase in the name of the son to be a trust for the father consists of, 1st, Deeds; 1. Father possessed the money; 2. Received the profits twenty years; 3. Made leases; 4. Took fines; 5. Enclosed part in a park; 6. Built much; 7. Provided materials for more; 8. Directed Lord Chief Justice *North* to draw a settlement; 9. Treated about the sale of it. 2dly, Words: 1. *Thomas Grey* confessed the

the truth; 2. Advised his father to sell, and buy *York* House; 3. "If it was mine," says he, "I would sell it;" 4. Before he made his will, said it was his father's; 5. After he made his will, said it was to keep his brother from pretending.

The disproof of the trust stands upon the like evidence, Deeds and Words: 1st, Deeds; For *Thomas Grey* bound with Lord *William*, for 7000*l.* of the purchase-money. 2dly, Words of the Lord *William*. 1. Before the purchase, said he would buy it for his son; 2. After the purchase, said he had bought it for his son; 3. The now purchased land mine, but *Gosfield* my son's, *T. G.*; 4. *Gosfield* was the inheritance of my son's mother, hence would better have bought *Hatton Garden.* I have no title but by my son's will, it being the purchase of my son *T. G.* 3dly, Words of *Thomas Grey*: 1. I believe my father will give me all, but *Gosfield* is mine already; 2. *Thomas Grey*, when he lay dying, excused it to his brother *Ralph*, that he had by his will given *Gosfield* to his father. Now, though this proved but an estate for life, when, perhaps, he thought he had given an inheritance, yet what needed any excuse at all, if *Thomas Grey* was but a trustee for his father?

Upon these facts, the law will best appear by these steps. 1. Generally and *prima facie*, as they say, a purchase in the name of a stranger is a trust, for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent. 2. But yet it may be a trust, if it be so declared antecedently or subsequently, under the hand and seal of both parties. 3. Nay, it may be a trust, if it be so declared by parol, and both parties uniformly concur in that declaration. 4. The parol declarations in this case are both ways; the father and son sometimes declaring for, and sometimes

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times against, themselves. 5. *Ergo*, there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. 6. And herein the great question is, whether the law will admit of any constructive trust at all between father and son?

1. For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law; for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions.

2. The wisdom of the common law did so; for all the books are agreed on this point, that a feoffment to a stranger, without a consideration, raised a use to the feoffor; but a feoffment to the son, without other consideration, raised no use by implication to the father, for the consideration of blood settled the use in the son, and made it an advancement. How can this Court justify itself to the world, if it should be so arbitrary as to make the law of trusts to differ from the law of uses, in the same case?

3. Again, as land can never lineally ascend, so neither shall the trust of land lineally ascend, where it is left to the construction of law; for the reason why land doth not lineally ascend, is not, as my Lord *Coke* says, from natural philosophy, *quia gravia deorsum*, but from moral philosophy, *quia amor descendit non ascendit*, and from divinity, because fathers are bound to provide for their

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their children, but children do not provide for their fathers; therefore, when a father, according to his duty, has provided for his son, it were hard to take away that provision by a constructive trust.

4. And therefore it is not reasonable that the father's perception of profits, or making leases, or doing such other acts as these, which the son, in good manners, does not contradict, should turn a presumptive advancement into a trust.

5. Examine all the cases in this Court, whenever this point has been stirred, and you shall find all the resolutions to agree, and out of them all may at large be collected a clear difference to rest upon. 1st. If a father makes his son a joint purchaser with him, and receives all the profits, and disposes of the rents, this is no evidence of a trust; but the son takes the whole by advancement if he survives. So it was thrice agreed in the case of *Windham* v. *Windham*, *Strode* v. *Strode*, and *Adrian Scroop* (*a*). Here a learned Custos did once seem to take a difference, by saying, true, so it is, when the son is joint purchaser, for then the father, as joint tenant, may, by law, receive the profits; but where the son is the only purchaser, there the father's perception of profits being against law, may be some evidence of a trust, for else the father has no colour to receive them. Plainly, this difference could not be the reason of these resolutions, for had the father been joint purchaser with a stranger, and received all the profits, without contradiction or suit, in necessity the perception of profits would have been evidence of a trust, yet there it might said, still one joint tenant may, by law, receive all. *Ergo*, it was the sonship, not the joint tenancy, which ruled those cases. 2d. If a father purchases lands in the

(*a*) 1 *Ca.* in *Cha.* 27. 2 *Freem.* 171.

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the name of an infant child, and receives all the profits, and makes leases, this is no evidence of a trust. So adjudged in the Lady *Gorge*'s case (*a*), in whose name, her father, the Earl of *Lincoln*, purchased. Here some before me have taken another difference; where the father has colour to receive the profits as guardian, there perception of profits is no evidence of a trust, otherwise it would be if the perception of profits were without any such colour. Plainly, the reason of the resolutions stands not upon the guardianship, but upon the presumptive advancement; for a purchase in the name of an infant stranger, with perception of profits, &c. will be evidence of a trust.

6. *Ergo*, where the father intends a trust, he ought to see it declared in writing, or supported by direct proof, and not rest upon constructions; for in Sir *Adrian Scroop*'s case, when the court had adjudged it an advancement and no trust, a concealed deed was after found, declaring the trust, which shews that good advice had been taken upon it.

7. Lastly, the difference I rely upon is this; where the son is not at all or but in part advanced, and where he is fully advanced in his father's lifetime. If the son be not at all or but in part advanced, there if he suffer the father, who purchased in his name, to receive the profits, &c. this act of reverence and good manners will not contradict the nature of things, and turn a presumptive advancement into a trust; the rather because in this family there were neither debts nor casualties, so no occasion to create trusts; but if the son be married in his father's lifetime, and by his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated, there

(*a*) Cit. *Cro. Car.* 550.

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a subsequent purchase by the father in the name of such a son, with perception of profits, &c. by the father, will be evidence of a trust; for all presumption of an advancement ceases.

So it was decreed an advancement of *Thomas Gray*, and no trust for the Lord *William*. It followed that the 12,000*l.* given by Lord *William* must be raised out of the lands in *Northumberland*, the lands in *Epping*, and the now purchased lands in *Gosfield*; and, *ergo*, an account was decreed. 1. The Lady must account for what the Lord *Ralph* received, as far as she has assets. 2. And for what she herself received. 3. And for the personal estate of Lord *Ralph*; but to this last point her counsel opposed, saying, that the Lord *Ralph* having charged *Gosfield* with the portions, as it seems by this resolution he had power to do, has thereby exempted the personal estate from being subject to this account; to which I declared, that though an express clause may exempt a personal estate from being applied to ease the land, to which it is otherwise subject, *prima facie*, as in the Duke of *Richmond's* case, where there was such an exemption, yet this is never to be done by implication. In case of creditors, it is clear that no implication can exclude them from that right which they have by law, of resorting to the personal estate; nor can any express clause exclude the creditors; and in case of an heir, it is clear that he is concerned, that no more of the land be sold than is necessary, and has right and equity to demand that the personal estate may ease him, as far as it will go; from which right no implication can exclude him."

"1 *June*, 30 *Car.* 2. 1678. *Ford* Lord *Grey* v. Lady *Grey*. The matter arose upon two exceptions, one by the Plaintiff, another by Defendant, to the master's report.

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port. The first was touching a sum of 1000*l.*, in the *African* Company, which the master reported to be the estate of *William* Lord *Grey*, to whom the Defendant is executrix; but the Plaintiff excepted to it and would have it the estate of *Ralph* Lord *Grey*, to whom the Defendant is also executrix, but then it would be liable to *Ralph*'s debts, which are many, *William*'s debts being none at all.

Trust not an advancement.

Now for that the case was, that *Grey* adventured 2000*l.* in the first company and lost it, then he subscribes 100*l.* more to the second stock in the new company, and pays in but 50*l.* and dies. *William* Lord *Grey* pays in the rest, and, as the proof was, refused to pay in the money till his son *Ralph* declared the trusts, yet the Plaintiff would have had it an advancement of *Ralph*, who was advanced before, so that exception was over-ruled.

2. The next question arose touching paraphernalia, under which title the Defendant claimed her jewels, and her chamber plate, and excepted to the master's report, for not so allowing it to her, not only in respect of her quality, as the widow of a Peer, but also because the question was between the son and the mother, not between the mother and the creditors; yet I allowed the master's report; for if the son will contest this point with his mother, he ought to prevail, because in consequence it concerns all the creditors, whose security is weakened if the assets be diminished, and there is no reason to consider any lady's quality, so far for the sake of it to prejudice the just satisfaction of creditors." Lord *Nottingham*'s MSS.

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June 22. 29 Car. 2. 1677.

Effect of fine and non-claim in equity.

"THIS case held three days debate in court; for *Saturday* the 16th was taken up by the Plaintiff, *Monday* the 18th by the Defendant, *Tuesday* the 19th was allowed to sum up the evidence, and then I took time till this day to consider what had been said, and to deliver my own opinion; which was this: —

The Plaintiff is the son and heir of *Owen Salsbury*, who was the son and heir of *William Salsbury*, the Defendant's wife is daughter and heir of *Charles Salsbury* who was a younger son of the same *William Salsbury*. The bill prays an execution *in specie* of certain articles of agreement, made 9 *Jac.*, upon the marriage of *William*, the grandfather, with *Dorothy Vaughan* the daughter of *Owen Vaughan*. By these articles *William Salsbury* was so to settle his lands in *Merioneth* and *Denbighshire*, that *William Salsbury* was to be but tenant for life, with remainder to his first and every other son in tail, with divers remainders over; and this to be was done at any time within seven years, upon the request of *Owen Vaughan*; and accordingly in 13 *Jac.* the *Merionethshire* lands are settled on *William Salsbury* for life, the remainder to *Owen Salsbury* who was then born, in tail, the remainder over, as by the articles is directed; but the bill complains that the *Denbighshire* lands are unsettled, and that *Charles*, the Defendant's father, obtained a settlement of those lands upon his marriage with the daughter of *Thelwall*; and the bill charges that *Charles* and *Thelwall* had notice of these articles at the time of that settlement, and long before; and that Sir *Walter Bagott* the Defendant, before his marriage with his lady, had also notice of the Plaintiff's title

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otherwise than as heir; and upon this case relief is prayed.

The Defendant makes many defences against this demand. 1*st.* There are no articles of agreement proved. 2*d.* If they be proved, yet it is to be presumed they were waved and discharged, or otherwise satisfied by some new agreement. 3*d.* If not so, yet *Charles Salsbury* was a purchaser without notice. 4*th.* If not either, yet Sir *Walter Bagott*, was so. 5*th.* If there be notice, yet length of time has barred this demand. 6*th.* If not barred by the common law, and course of this court, yet the fine & non-claim have barred it by the statute, 4 H. 7.

These are the six points of the case. If any of these points be for the Defendant, he ought to be in possession of the whole; if they be all for the Plaintiff, he must have a decree for some part.

I. *First point,* For the first point, whether there be any sufficient proof of articles of agreement in this case, that point is clearly with the Plaintiff. For;

1*st.* That there were articles of agreement as to the *Merionethshire* lands, is without all dispute.

2*d.* That *Owen Salsbury* had a copy of the articles upon his father's marriage, and that this copy did comprehend the *Denbighshire* lands, is more plain; for that copy was twice produced by *Owen Salsbury;* once to *William Humphrys* alone, another time to him and *John Wynn* together; who advised a suit upon them.

3*d.* That the copy now read, if not the same, was at least an ancient copy, is plain upon the view; and *ergo,* as

as it could not be made to serve this turn, so it is not fit the small mistakes and errors in clerkship should discredit it.

4*th.* That there was an original kept by *Owen Vaughan*, and by his death came to the hands of *Edward Vaughan*, is plain; for *Humphry Wynn* saw them there; and that all the writings in *Lludyard* came to the hands of *Charles Salsbury* is plain too; *ergo*, by these hands they are suppressed.

5*th.* Two witnesses swear there were articles, and that the *Denbighshire* lands were comprehended in them; which is enough to give credit to any probable copy.

6*th.* *Wynn* swears that he believes the copy now produced to be a true copy, and it is in the Defendants' power to falsify it, if it be not so; for they have the original, or else they or their father have suppressed it. Wherefore the copy is justly read.

7*th.* *William Salsbury*'s own confession. For *Gabriel Humphrys*, swears that *William Salsbury* said, if he had seen the settlement upon *Owen Salsbury*'s marriage he would not have done what he did to *Charles*, and hoped *Charles* would prove an honest man. The words of *William Salsbury* against himself, are more to be credited than the words he spoke for himself, when he said I may give my *Denbighshire* lands where I please, which may be well expounded of the new purchased lands.

8*th.* The forgery of the deed seems to me a strong evidence that such articles there were, for it had been not only wicked, but foolish, and a folly next to madness, to go about to forge a settlement in performance of articles, if there had not been indubitable proof that such

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articles there were, which might give countenance to such a forgery.

9. *Lastly*, the *testimonium rei.* The constant hopes and fears in this family, that the articles would one day rise up in judgment, which have made both sides over-act their parts, viz. The Plaintiff's brother to forge a deed, the Defendant's father to suppress the original articles; and yet neither side needed to have done this if the rest of the points be with them.

II. *Second Point*, Whether it may not be fairly presumed, that these articles have been waved or satisfied by some new agreement? This point also is clearly with the Plaintiff. It involves two considerations: 1. In law, whether tenant in tail of an equity can, by any collateral agreement with recompense, bar his issue of that equity? 2. In fact, whether there be any ground to presume such an agreement in this case?

1. *First*, Of the law, there is no doubt; for an equity in tail is not within the statute of *Westminster* the 2d, *de donis conditionalibus*; but it is a mere creature of the Chancellor, which is to be governed and disposed according to rules of conscience. So it was ruled in 1674 between *Norcliff* and *Worsly* (*a*), where an equity in tail was made subject to a marriage-settlement; and so it had been ruled before between *Rosoarrock* and *Barton* (*b*), where an equity of redemption was entailed.

2. But the fact will not bear this point; for that agreement, which is supposed to be a recompense of the first articles, and to amount to a waiver of them, viz.

(*a*) 1 *Ca.* in *Cha.* 234. (*b*) 1 *Ca.* in *Cha.* 217.

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The settlement of the new purchased lands in *Merionethshire*, and *William Salsbury's* quitting his estate for life in the old estate in *Merionethshire*, which was done after *Owen Salsbury* had married *Goodman's* daughter, can never be so construed; for in all that transaction there was a plain and express intent of a purchase; for *Owen Salsbury* paid his father 2500*l.*, which is as much as all that exceeded the articles was worth; and, *ergo*, no other intent is to be presumed, nor will this be strained to make a waiver of the former articles.

III. *Third Point*, — If the articles remain in force, the next question is, whether *Charles Salsbury*, upon the marriage of *Thelwall's* daughter, became such a purchaser, without notice, as ought to be free from these articles? This point is also for the Plaintiff, for *Thelwall* had a clear notice long before the marriage of his daughter to *Charles Salsbury*, knew the secrets of the family, and, while he stood unconcerned, expostulated with *William Salsbury* for not performing the articles to *Owen Salsbury*; and though he afterwards ventured upon the marriage of his daughter to *Charles Salsbury*, yet he saw the hazard was not great, for the portion was but small, and the new purchased land a sufficient estate. 2. *Charles Salsbury* had notice too, and timely notice, even before marriage; else, why did he say, in the presence of *Ravenscroft*, where *William Salsbury* was discoursing with *Thelwall* about the articles, I had rather take an annuity than involve myself in trouble? Why did he say, my brother may come and lay his hand upon my shoulder, and turn me out as in *Boidewithin*? Why so much care to possess the original articles and then suppress them?

IV. *Fourth Point*, — The next question is, whether Sir *Walter Bagott* be a purchaser without notice? This

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point is not otherwise material, than upon supposition, that *Charles* stands unaffected with notice; for a purchaser with notice from him that had no notice, or a purchaser without notice from him that had notice, are equally free. And here the first thing to be considered in point of fact is, the time when Sir *Walter Bagott* became a purchaser. Plainly, not at the time of his marriage; for his lady was an infant, and could not contract for her estate, though she might contract for her person; and, *ergo*, articles to settle her estate are void, and work not in the case; nor at the time of Sir *Edward Bagott*'s settlement, for that could not make him a purchaser till there could be a seller, and that could not be till Mrs. *Jane Salsbury* came of age, though her mother and all her friends were privy, and consented to her agreement; *ergo*, the first time of his purchase was two years after the marriage, when Lady *Bagott* levied a fine of her estate, and settled it in lieu of these provisions, which are made for her upon her marriage. Any notice before this time is sufficient; two notices are insisted on: One an express message sent by the Plaintiff, to tell Sir *Walter* that the Plaintiff had a title otherwise than as heir. This notice will not do, for it is no direct nor intelligible notice, and is the worse, because he that sent this notice might have spoken out more clearly, if he pleased. It is true, it puts Sir *Walter Bagott* upon the inquiry; but it is such an inquiry as can never inform him, unless he will go to the Plaintiff in *Wales*, which he is not bound to do; and as Mr. Solicitor observed, the notice is true if meant of the forged deed; and shall so ambiguous a notice be afterwards made use of as notice of the articles?* It looks a little more suspiciously, that the Plaintiff gave so dark a notice, and shews some kind of inclination to make use of the forged deed; for had he given notice of a title by the articles, this had discredited the deed; if he had mentioned

mentioned the deed, the matter had taken air too soon. *Ergo*, the notice is less than a common bruit, and the rule, *notitia non debit claudicare*, was never more seasonable than now, for perhaps Sir *Walter* might think it a trick to break his marriage; and, *ergo*, had no reason to regard it. 2. But yet the other notice of the articles, by hearing a copy thereof read at the trial of the deed, is full and conclusive notice, before seventy-two; and for this reason only this fourth point is also for the Plaintiff.

V. *Fifth Point*, Admit the articles and the notice, yet since the articles from 1611 to this day, which is 66 years, have been without any execution, whether this length of time alone be not in itself a sufficient bar in equity from any former demand, is the next point? This fifth point also is clearly for the Plaintiff, for length of time is not to be measured by revolutions of years only, but by the wilful and inexcusable negligence of him that pursues, of which there is none at all in this case. 1. *Owen Salsbury* came of age in 1634, and died in 1657. 2. The time when *Owen Salsbury* first had a copy of the articles does not appear. It is probable he had them not in 1640, when he came to an agreement with his father for the *Merioneth* lands. 3. When he had got a copy, it is plain he shewed it, and insisted upon it in all companies. 4. If the excuse had been only upon the account of his piety, that he would not sue his father, lest he should bring his grey hairs with sorrow to the grave, as the witnesses swear, it had been very allowable. 5. But I think he had another, and more powerful excuse, which has not yet been taken notice of, and that is, it was against his interest to sue his father, till he must needs; for his father had new purchased lands in *Denbighshire*, to the value of 500*l.* *per annum*, and until the conveyance in 1652, which was followed with a fine in 1656, *Owen Salsbury* was not quite

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quite out of hopes to have some of the new purchased lands; but as soon as he began to despair, he complained grievously, and in 1657 he died. *Ergo*, though length of time be in most cases very considerable, because in our law 60 years bar a writ of right, 20 years bar an entry, and in the civil law 40 years make a prescription, yet when length of time is not accompanied with any considerable laches of suit, there is no great weight to be laid upon it.

VI. *Sixth Point*, Therefore the last question is, whether the fine in 1656, and the non-claim insisted upon have not barred the Plaintiff by the statute of 4 H. 7. 2. And this point is clearly against the Plaintiff, and will prove very fatal to him. Wherein it will be fit to proceed by these steps.

1. A fine doth bar a trust or any other right in equity; for it is within the very words and meaning of the law, which concludes all persons, as well privies as strangers, who do not make their claim as the act directs; and the mischief were intolerable, if a right in equity should still subsist after a fine; for no man living could know when his inheritance was in peace. This point was never doubted since Lord *Coventry*'s time, who first referred it to all the Judges in *England*, in a case between Sir *Thomas Thynn* and *John Cary*, Esq. 4 *Car.* 1. (*a*). For Sir *Thomas Thynn* supposed himself to have a right in equity to some lands, whereof by his bill he charged *Cary* to have obtained a conveyance from the Lady *Knivet* by some indirect means. *Cary* pleaded in bar a fine, with proclamations and non-claim; and, by opinion of all the Judges, Sir *Thomas Thynn* was barred. The differences are these; where

(*a*) *Thynne* v. *Cary*, *W. Jones*, 416.

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a man has the right in equity in the land itself, and where he has right in equity is only against the person in respect of the land. In the first case, a fine will bar, not in the latter. As in the case of the Earl *Kenoul* against *Grevil*, H. 28 *Car*. 2. (*b*), where the Earl of *Carlisle* having mortgaged the manor of *Sowly* to *Tryon*, for 1500*l*., did by his will devise certain lands to trustees for payment of debts, and an annuity of 1000*l*. *per annum* to the Earl of *Kenoul* for life, out of the demesne of *Waltham*, and then demised the manor of *Sowly* to the Lady *Manchester* for life, remainder to Mr. *Grevil*. Now though the manor of *Sowly* ought to have borne its load, the mortgage money due upon it being no part of those debts in the schedule with which the trustees were charged, yet such collusion was used, that the trustees were prevailed with to pay off the mortgage upon *Sowly*, and then the rest of the lands being not sufficient to pay off the rest of the debts, part of the demesnes of *Waltham*, were by the will to be sold to supply that defect, and so the security of the Earl of *Kenoul*'s annuity would have been straitened; to prevent this, the Earl of *Kenoul* exhibits his bill against *Grevil*, and prays that he may reimburse the 1500*l*. of which *Sowly* has been unjustly eased, that so no part of *Waltham* might be sold. *Grevil* pleads a settlement of the manor of *Sowly*, by a fine, with proclamations, in bar of this bill, which was overruled, for the Plaintiff's demand was not against the land at *Sowly*, but against the person of the Defendant in respect of the land, and so the fine was not material. Another difference is, where the equity rises by the fine itself, and where it rises by some collateral agreement. If the equity rises by the fine itself, as if it be a fine upon a trust or mortgage, there this fine can never bar this equity; for that were absurd, that the same fine which creates the

(*b*) *Lord Kennoull* v. *The Earl of Bedford*, 1 *Ca.* in *Cha*. 295.

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the equity should bar it too. But if it rise by some collateral agreement, and be an equity against the land itself, there a fine and five years will bar this equity, unless it be saved by a due and reasonable claim; and this was ruled lately in the case of *Gifford* and *Phillips*, *M.* 27. *Car.* 2.; where *George Low*, against whom a decree had passed for 8000*l.*, did by his will subject his land to the payment of his debts, in case the personal estate was not sufficient; the heir of *George Low* sold the land in 1649, to Sir *Harbottle Grimstone*, and he in 1653 to the Defendants, by fine and recovery, and a bill being exhibited to have satisfaction of this money, out of that land, the fine and non-claim were allowed to be a good plea in bar.

Another difference is this; where the fine is obtained by fraud and practice, or is infected with notice, or any way criminal, such a fine and nonclaim bar no man's pursuit. Otherwise it is of a fine and non-claim, severed from these circumstances. As in the case of *Bovy* and *Smith*, 18th of *December* 1676, where a trustee made a conveyance in breach of trust, and presently after retook the estate by fine; this being all one entire act, and a purchase with full notice, could not prevail against the *cestui que trust* by non-claim, for *dolus circuitu non tollitur;* but a fine innocently levied to a stranger, had barred the *cestui que trust*.

This foundation being laid,

2. It remains now to be considered what has been done in this case, to save the Plaintiff's right in equity, from that bar which the fine levied by his grandfather, would otherwise operate. Plainly nothing at all. The right which should be saved is an equity, which the Plaintiff's father *Owen Salsbury* had to be made tenant in tail

in tail in remainder, after the death of *William* the grandfather. Had such an estate been settled on the Plaintiff's father, by act executed, then the fine levied by *William*, the grandfather, had not concluded the Plaintiff, till five years past after the death of the grandfather, which is the natural time for the remainder man to enter, and then enough has been done to avoid the fine; for there is an entry in 1662, which is within two years after the grandfather's death; which was the first time the remainder man was bound to take notice of his right of entry; for of a right of entry for forfeiture, no man is bound to take advantage, though he doth know it. But *Owen Salsbury* having only an equity and no estate executed, this has quite changed the state of the case, and altered all the measures of it; for now the Plaintiff's claim to preserve this right is neither in due time, nor in due manner.

1. It is not in due time; For the right which *Owen Salsbury* had to a remainder after an estate for life, though it were future as to the possession, yet it was a present right to demand such a settlement; and he had a present occasion to make that demand, when in 1652 *William Salsbury*, for 1900*l.*, settled it on *Charles*. And *ergo*, when *William Salsbury*, in 1656, levied a fine to the uses of that settlement, *Owen Salsbury* ought presently to have made claim; for the five years did immediately commence and attach in his person; and though he died shortly after in 1657, yet the five years do still run on against the Plaintiff during his minority. So that the Plaintiff's entry in 1662, being six years after the fine levied, is quite out of time, and comes too late.

2. If it had been in due time, yet it is not in due manner. For the only way to preserve a right in equity from being bound by a fine, is by bringing a subpœna,

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Appendix.
SALSBURY v. BAGOTT.

and not by an entry into the land; and, *ergo*, all the strife at bar to prove the Plaintiff's entry in *Betega* to have been upon the new purchased lands, and not upon the old estate, is wholly impertinent. For let the entry be where it will, no kind of entry can avail the Plaintiff, nothing but a subpœna can help him; and the reason is most evident, from the words of the statute: for the statute of 4 *H.* 7. saves no rights, but such as are pursued by action or lawful entry; and, *ergo*, such rights as are pursued neither way, are quite barred. Hence it is, that the ancient way of entering a claim at the foot of the fine is now quite abrogated; for this statute prescribes another way, viz. action, or lawful entry, 2. *Inst. de modo levandi, &c.*; and for this reason, if tenant in tail discontinue by feoffment, and the feoffee levies a fine, and then tenant in tail dies, and the issue enters within five years, this avoids not the fine; because the entry upon the discontinuee is no lawful entry, but the issue ought to have brought a *formedon*. So here, the Plaintiff's entry, who was only entitled to a trust or an equity, was not a lawful entry, and by consequence does not avoid the fine; but the Plaintiff ought to have brought a subpœna. I see plainly it is the forgery of the younger brother, which has abused the Plaintiff, and undone him, while it pretended to serve him; for the Plaintiff, supposing the deed to be a good deed, has been lulled to sleep by it, and provided only to save his right of entry at law, but never thought of using the means to save his right in equity, till it was too late; for he filed no bill in Chancery till 1672; so that, although the five years which attached in his father's lifetime should not run on against him, yet there is a great laches in former time, even from 1662 till 1672, which is ten years before that trial, which only gave notice to *Bagott* of the articles. And for direct authority on the point, it was so directly resolved in the Exchequer by the Lord Chief Baron *Hale*

Hale and the Court, in a case between Sir *Nicholas Stoughton* and Mr. *Arthur Onslow*, viz. 1. A fine and non-claim bar a trust or an equity. 2. An entry upon the land will not avoid the bar of such a fine, because it was no lawful entry, but he ought to have brought a subpœna. After so great an authority as this there is no more room left for doubting, wherefore the Plaintiff's bill must be dismissed.

Note. — The order of dismission is directed to be drawn up generally without mention of the grounds or reasons of it." — Lord *Nottingham*'s MSS.

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END OF THE SECOND VOLUME.

Printed by A. Strahan, Law-Printer to His Majesty, Printers-Street, London.

New Zealand and Ireland;—Colonial Economy, embracing a New Mode of Combining Land, Labour, and Capital in the Development of our Colonial Resources. By W. Bridges, Esq. 16 pp. London: D. M. Aird.

The observations of Mr. Bridges come with some weight, and are worthy of deep consideration, from his position as editor of the "New Zealand Journal," and Secretary to the New Zealand Society. The pamphlet is divided into sections, each of which deals with a separate head, and handles it well, and we recommend this paper to the serious attention of all interested in colonies and colonisation.

The Debts of the States. Philadelphia: J. Crissy. Pp. 36.

This is a reprint of an able article from the "North American Review" for January, on a subject of great political importance, and we are glad to see it discussed in a reasonable and honourable manner.

A Lecture on the Oregon Territory. By Peter A. Browne, LL.D. Pp. 20. Philadelphia: U. S Gaz. Office. 1843.

A laboured and industrious effort to prove the right of the United States to this disputed territory, of which we gave a description in our first number.

Journal of a Voyage from Plymouth to Sydney, in Australia. By J. S. Prout, Artist. Pp. 23. London: Smith and Elder. 1844.

The writer, who is a man of education and an accomplished artist, gives us a pleasant narrative of his voyage in the emigrant ship Royal Sovereign, and a brief account of Port Phillip. We have no room now for extracts, but may return to the "Journal." In the mean while, we are glad to find that Mr. Prout has found scope for his talents in Sydney, having associated himself with Mr. G. Arden in bringing out an illustrated monthly magazine in that colony, making two creditable periodicals now issued there.

The Bible the only sound Foundation of British Legislation. By a Bermudian. Second Edition. 39 pp. Bermuda: D. M'Phee Lee.

A well-intended pamphlet from a philanthropist, but scarcely coming within our province to notice or discuss.

Prince's Descriptive Catalogue of Fruit and Ornamental Trees, &c., Cultivated and for Sale at the Linnæan Botanic Garden and Nursery, Flushing, Long Island, near New York. 33rd edition. Pp. 60. 1844.

The arrangement and printing of this neat and useful Catalogue are a credit to our Transatlantic neighbours. Every nurseryman and fruit-grower should apply for a copy.

Catalogue of Books relating to North and South America. 48 pp. London: Rich, Red Lion Square.

and capabilities. We consider all these class publications, devoted to the interests of separate colonies, as necessary to the well-being of new settlements, and useful adjuncts to a publication like our own, devoted to the more general advocacy of all, and, therefore, from want of space, less able to do justice to the claims of each integral part of our colonial empire. The "Swan River News" is well edited, and carefully arranged.

South Australian News, No. 20.

Another class publication, issued monthly, and interesting to those who have friends in the colony.

The New Zealand Journal for February 3 and 17.

Hunt's Merchants' Magazine for January and February. New York: Freeman Hunt.

Excellent numbers of an excellent magazine.

The Newfoundland Almanac for 1844. Compiled by Joseph Templeman, Esq., of the Secretary's Office.

This Almanac, besides the usual local, statistical, and general information, always contains a carefully-arranged meteorological register for the past year, and many valuable tables and particulars of the trade and commerce of the island. We have received the Almanac regularly for many years, and are pleased to find a marked annual improvement in its arrangement and contents, and in the completeness of the local information which it furnishes.

The Artizan, No. 13, for February. London: Simpkin & Marshall.

This monthly journal of the operative arts addresses itself to the general reader as well as to the mechanist and scientific man, and contains some very able and argumentative papers on subjects of popular interest, besides those articles devoted more exclusively to scientific purposes. Such publications are eminently beneficial in the diffusion of useful knowledge.

The British Cultivator and Agricultural Review, No. 1, January. London: Simpkin and Marshall.

A neat, cheap, and, therefore, useful publication, well adapted for general circulation, at a time when improvements in agriculture and rural economy occupy so large a share of public attention.

The Gardener's Almanack for 1844. By Geo. W. Johnson, Esq. Pp. 150.

One of the best-arranged and most complete of the horticultural almanacks which have come under our observation. To the colonies it will be highly interesting as a manual of reference on agricultural chemistry, and the improvements in rural economy which have taken place in the past year.

The Belle Assemblée, *Sporting Review*, and *Farmers' Magazine*, for February. London: J. Rogerson, Norfolk Street.

The Apprentice, and Trades' Weekly Register, No. 2. London: D. M. Aird.

Mr. Buckingham's Inaugural Lecture at the opening of the British and Foreign Institute. London: Fisher, Son, & Co.

THE END.

W. Pople, Printer,
67, Chancery Lane.